

Administrative and Political Control
Over Federal Government Contracting
in Canada

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ABSTRACT

This thesis examines political and administrative controls over federal government contracting. More specifically, it addresses itself to a consideration of the objectives, problems and sources of control relevant to goods and construction procurement.

The objectives of control are threefold: the attainment of fair value, the achievement of equity and the promotion of socio-economic goals compatible with traditional procurement standards. The problems of control, expressed in terms of the objectives, are cost control, the maintenance of fairness and justice in the procurement process, and the achievement of consistency between socio-economic goals and the procurement function of government. The sources of control include parliamentary, executive, administrative, legal and judicial control mechanisms. These controls are considered in the context of their ability to affect the procedures and substance of government contracting and thereby to deal with contractual problems that impede the attainment of the objectives of control.

The analysis shows that the objectives of control have all too often been frustrated and undermined. There seem to be too many problems and too few effective sources

of control to maintain that political and administrative control over government contracting is adequate. Possible solutions to some of these problems are suggested.

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A NOTE ON METHODOLOGY

In the preparation of this study, every effort has been made to ensure that the resources used are up to date. To this end, the study relies heavily on current primary sources and data obtained through interviews with civil servants in various departments of government. It should also be noted that much of the information contained in this study has been reviewed for substance by a government procurement official, who has asked that he remain anonymous.

PREFACE

This thesis will examine the exercise of political and administrative control over federal government contracting¹ in Canada. The major proposition to be examined is that political and administrative control and influence over federal government contracting are inadequate to achieve certain principles relating to the conduct of Canadian governmental affairs in the area of procurement. The principles referred to maintain that:

- 1) the government should obtain fair value for the taxpayer's dollar;
- 2) the government should be equitable in the dispensation of public funds; and
- 3) the government should, when appropriate, relate its procurement activities to national policies and objectives.

¹The words contracting and procurement both have distinct meanings. Contracting means to engage in a legally binding agreement and procurement means to obtain or secure. The emphasis of this study requires that these two terms be used interchangeably. It is therefore necessary to stipulate the context in which these words will be used.

This study is concerned not only with government procurement, but also with the formal instruments applied thereto. Consequently, when the term contracting is used it should be taken to mean contracting for the purpose of government procurement. Similarly, when the term procurement is used it refers to procurement by means of formal agreement or contract. Therefore, this study does not deal with such things as subsidy, revenue, venture or employment contracts.

This study shall endeavour to show the need for improved political and administrative control over government contracting in the context of achieving these principles.

The first chapter is intended as a general introduction to the subject of federal government contracting in Canada. It will contain a description of the federal government institutions relevant to the conduct of contracting, as well as a description of the various types of contract with which the government is involved. It should be noted in this regard that this study will focus primarily on two types of contract - namely, goods and construction contracts. The first chapter will also deal briefly with the present trends in Canadian government procurement. This will be done by examining the growth, economic significance and complexity of the government procurement function.

The second chapter will discuss the objectives underlying the exercise of control over government contracting. It will also undertake to define what is meant by the word control and to make a distinction between the words control, authority and influence as they pertain to this study.

The third chapter will examine certain major problems in government contracting which act to hinder the attainment of the objectives discussed in Chapter II and thereby reduce effective control over government procurement by the government departments and agencies concerned. It will be the purpose of this chapter to provide a basis for a consideration in subsequent chapters of the sources of control and an

evaluation of the role they play as instruments of control.

Chapters IV through VII will deal with the sources of control over federal government contracting. Chapter IV will deal with parliamentary controls, Chapter V with executive controls, Chapter VI with administrative controls and Chapter VII with legal and judicial forms of control. These chapters will discuss how the various sources of control affect the procedure and substance of contracting, in addition to considering the extent to which those who exercise control are able to help remove obstacles which impede the exercise of control over government contracting. These chapters will also attempt to draw some conclusions as to what can be done to improve the exercise of control over federal government contracting in Canada.

The final chapter, Chapter VIII, will contain a summary of some of the major problems within the procurement system and an assessment of the extent to which the objectives of control - fair value, equity and the promotion of national goals - have been met.

I would like to thank a number of individuals for their help in the preparation of this study. Of particular note is my thesis supervisor, W. D. K. Kernaghan, who diligently devoted himself to his student. His guidance in the development of this study was much appreciated, as were his criticisms and suggestions. I would also like to express my gratitude to C. Baar and T. Carroll. Their comments and criticisms were warmly welcomed.

Special thanks are also due S. Fyfe, A. Macintyre and a number of confidential sources for their valued contributions. And finally, I would like to express my indebtedness to H. R. Balls for having kindled my interest in the subject of federal government contracting.

PART 1

INTRODUCTION, OBJECTIVES
AND PROBLEMS

CHAPTER I

INTRODUCTION

It is often the case that detail clouds the identification of salient issues. This study hopes to avoid this problem by providing some perspective on the forest before advancing to a consideration of the trees and underbrush. To this end, this chapter will provide some general background on the subject at hand - Canadian federal government contracting. This chapter will first provide an introduction to those federal government institutions most relevant to the conduct of government contracting. It will then describe the various types of contract with which the government is involved and identify those upon which this study will focus. And finally, it will examine briefly the present trends in Canadian government procurement. It will do so in terms of examining the growth of government procurement, its economic significance and its complexity.

The task of discovering those federal government institutions most relevant to the conduct of government contracting is no easy matter. All departments and agencies in the Canadian government are involved to some extent in contracting. Certain of them are clearly more important than others. The best way to indicate the importance of the

TABLE 1

Rank Order of Government Departments
Based on Estimated² Dollar Value
of Contracts (all types)

Rank Order	Government Department	Estimated Dollar Value of Contracts
1	National Defence	1,148,170,151
2	Public Works	533,753,288
3	Transport	358,308,864
4	Indian Affairs & Northern Development	337,453,581
5	Manpower and Immigration	325,005,730
6	Post Office	234,658,246
7	Solicitor General	194,812,338
8	Environment	189,887,637
9	Secretary of State	90,792,447
10	National Health and Welfare	88,292,241
11	External Affairs	85,903,016
12	National Revenue	69,866,812
13	Agriculture	68,525,806
14	Veterans Affairs	67,105,643
15	Industry, Trade and Commerce	50,811,844
16	Energy, Mines and Resources	46,759,324
17	Supply and Services	42,805,305
18	Communications	37,252,775
19	Science and Technology	36,585,949
20	Regional Economic Expansion	27,373,265
21	Consumer and Corporate Affairs	15,054,439
22	Urban Affairs	12,076,538
23	Privy Council	9,760,589
24	Parliament	9,234,681
25	Labour	8,710,430
26	Finance	7,941,270
27	Justice	7,878,564
28	Treasury Board	7,160,796
29	Governor General and Lieutenant Governors	391,580

²These figures represent calculations done in accordance with Treasury Board methods for estimating procurement costs, as related by A. Macintyre, Group Chief Contracts Policy, Treasury Board, Government of Canada, Ottawa, July, 1976. These calculations are based upon columns 2, 4, 5, 6, 7, 8 and 9 of the Public Accounts object of expenditure tables. See - Government of Canada, Public Accounts of Canada 1976, Vol. 1, pp. 6.34-6.35.

various federal institutions to government contracting is to rank them according to the dollar value of the contracting that they undertake. Table 1 provides such a ranking for 29 government departments based on the estimated dollar volume of their contractual activities.

The data in Table 1 indicates that eight government departments engage in contractual activities that have a total value of more than one hundred million dollars. These eight departments, when taken together, account for over 80%³ of the estimated total value of all Canadian federal government contracts. The individual breakdown among these eight is shown in Table 2 below.⁴

TABLE 2
Percentage of Total Estimated Contractual
Activity by Department

Department	Percentage of Total Estimated Contractual Activity
Department of National Defence	27.9%
Department of Public Works	13.0%
Department of Transport	8.7%
Department of Indian Affairs & Northern Development	8.2%
Department of Manpower and Immigration	7.9%
Post Office Department	5.7%
Department of the Solicitor General	4.7%
Department of the Environment	4.6%
Total	80.7%

³The figure of 80% was derived from information in Table 1 and from other data contained in the Public Accounts of Canada.

⁴Ibid.

The figures in Table 2 give some indication of the importance of these eight departments to government contracting. It is interesting to note that the Department of National Defence and the Department of Public Works, when taken together, account for over 40% of the estimated contractual activity of the federal government. Although these two departments dominate in an overall sense, their importance is not necessarily felt in all areas of government contract expenditure. Table 3 gives some indication of the importance of various government departments to selected areas of contractual expenditure based upon the estimated dollar value of such expenditure.

The figures in Table 3 show the predominance of the Departments of National Defence, Public Works and Transport in many, if not most, of the various areas of contract expenditure. By comparison the other departments tend to concentrate a substantial portion of their contractual expenditures in only one or two areas. For instance, professional and special services contribute 90%⁵ of the estimated dollar value of all contractual activity undertaken by the Department of Manpower and Immigration. Similarly, 79.5%⁶ of the estimated dollar value of Post Office contracts

⁵Calculations are based upon data contained in: Government of Canada, Public Accounts of Canada 1976, Vol. 1, pp. 6.34-6.35.

⁶Ibid.

TABLE 3
Estimated Dollar Value of Selected Contractual Activity
By Area of Expenditure and Department⁷

	Transportation and Communications	Professional and Special Services	Rentals	Purchased Repair and Upkeep	Utilities Materials and Supplies	Construction and Acquisition of Land, Buildings and Equipment	Construction and Acquisition of Machinery and Equipment
Department of Indian Affairs and Northern Development		95,725,169				161,267,626	
Department of Manpower and Immig- ration		292,758,176					
Department of National Defence	113,834,409	129,311,146	23,091,620	176,917,652	375,395,548	58,808,877	270,810,899
Post Office Department	127,502,895						59,500,253
Department of Public Works		58,429,007	137,024,777	50,078,047	54,275,550	203,627,149	
Department of the Solicitor General					40,188,914	40,635,383	
Department of Transport		94,620,280			57,406,348	103,482,960	50,113,344
Department of the Environment						43,838,293	
Total Estimated Dollar Value of Selected Contractual Activity for All 8 Depart- ments	376,358,241	738,372,395	210,558,970	294,956,679	615,697,313	611,660,288	474,446,123

The areas of expenditure in Table 3 are based upon the object of expenditure tables in the Public Accounts of Canada. See- Government of Canada, Public Accounts of Canada 1976, Vol. 1, pp. 6134-6.35.

and 76%⁸ of the estimated dollar value of contracts by the Department of Indian Affairs and Northern Development are concentrated in only two areas of contractual expenditure.

Although statistical data has proved valuable in giving an indication of the importance of the various departments to government contracting, it has by no means told the whole story. A consideration of those departments performing common service and regulatory functions has been neglected.

The principal common service departments are the Department of Public Works and the Department of Supply and Services. The Department of Public Works is responsible for the management and direction of public works for the Government of Canada. It oversees the construction and maintenance of federal buildings, wharves, piers, roads, bridges, harbours and navigable channels. As the federal real property administrator, the department is also responsible for acquiring leased accommodation for federal use, in addition to administering any expropriation activities related to such acquisitions. The building construction and acquisition expenditures of the department increased by a factor of 2.65 over the last five years⁹, from 91.596 million dollars

⁸ Calculations are based upon data contained in: Government of Canada, Public Accounts of Canada 1976, Vol. 1, pp. 6.34-6.35.

⁹ Calculations are based upon information contained in: Government of Canada, Department of Public Works, 1975-76 Annual Report, p. 17.

in 1971 to 243.070 million dollars in 1976. In 1976, eighty percent¹⁰ of all Public Works' funding was applied, in almost equal proportions, toward the construction and acquisition of federal buildings and toward the leasing and maintenance of federal accommodation.¹¹

Among the major clients the Department of Public Works has served in recent years are the Department of Indian Affairs and Northern Development, the Department of the Environment, the Department of the Solicitor General and the Department of Transport. Tables 4 and 5 indicate the contractual expenditures made on behalf of these departments by the Department of Public Works.

These tables demonstrate the importance of these four departments to the total contracting activity of the Department of Public Works over a period of years. The surprising element has been that these four departments have consistently¹² maintained the position of being the Department of Public Works' major clients. The program needs

¹⁰ Ibid., p. 13.

¹¹ It is important to note that expenditures by the Department of Public Works fall into two categories. First, the department, with its own resources, is responsible for supplying federal accommodation. Its second responsibility is to act on behalf of other departments, using their resources, to meet their program (as distinct from accommodation) needs.

¹² Department of Public Works' records indicate that this consistency has been present since at least 1970. Where a department did not exist the functions that it would assume in later years formed the basis of this assessment.

TABLE 4

Percentage of Contractual Expenditures Applied
By the Department of Public Works on Behalf
of Selected Government Departments
(years refer to fiscal years)¹³

Department	1974-75	1975-76
Department of Indian Affairs and Northern Development	31%	23%
Department of the Environment	28%	21%
Department of the Solicitor General	15%	18%
All Other Departments	26%	38%
Total Expenditures	\$141 million	\$219 million

¹³ The information in this table was derived from data contained in: Government of Canada, Department of Public Works, 1975-76 Annual Report, p. 15.

TABLE 5

Dollar Value of Contractural Expenditures Applied
by the Department of Public Works on Behalf of
Selected Government Departments Since 1970
(years refer to fiscal years ended and
values are stated in millions
of dollars)¹⁴

Department	1970	1972	1974	1976
Department of Indian Affairs and Northern Development	13.7	15.5	27.8	50.4
Department of the Environment	- ^a	1.4 ^b	19.1	46.7
Department of the Solicitor General	14.2 ^c	10.2 ^c	14.6	38.6
Department of Transport	6.3	4.2	14.9	20.7

^aThe Department of the Environment did not formally exist at this time.

^bThis figure is not representative of all the functions under the authority of the Department of the Environment. The figure does not include a 6.8 million dollar Fisheries expenditure nor does it include a 5.9 million dollar Fisheries Research Board Expenditure.

^cThese figures do not include expenditures made by the Department of Public Works on behalf of the Royal Canadian Mounted Police. These expenditures, totalled 2.6 million dollars in the fiscal year ended 1970 and 10.1 million in the fiscal year ended 1972. Since 1965 the Solicitor General of Canada has been the minister designated to administer the Royal Canadian Mounted Police. However, the RCMP is designated to be a department within the scope and meaning of the Financial Administration Act.

¹⁴The data in this table represents a statement of account with respect of the undertakings of the Department of Public Works on behalf of selected federal government departments and agencies. For further information refer to: Government of Canada, Department of Public Works, 1975-76 Annual Report, pp. 25-26; Government of Canada, Department of Public Works, 1973-4 Annual Report, pp. 53-54; Government of Canada, Department of Public Works, 1972 Annual Report, pp. 32-33; Government of Canada, Department of Public Works, 1970 Annual Report, pp. 30-31. Also see - Government of Canada, Interdepartmental Committee on the Organization of the Government of Canada, Organization of the Government of Canada 1976, Section 8151 on the Royal Canadian Mounted Police.

of the other departments have not had a substantial impact in changing this situation.

The other major common service department, the Department of Supply and Services, is responsible for the provision of common services in the areas of procurement, accounting, payment and audit, distribution, warehousing and printing. It also provides professional audit, advisory management and computer services to government departments through the Audit Services Bureau, the Bureau of Management Consulting and the Advisory Bureau for Computing. The Audit Services Bureau provides audits of government contracts on request, where contract costs must be determined or where contractors' cost projections and budgets must be evaluated. The Bureau of Management Consulting offers a broad range of consulting services to government departments and agencies on a fee-for-service basis.

The Department of Supply and Services was created in 1969 as the result of a consolidation of government purchasing activities. In addition to its service and advisory functions it acts as a central procurement agency purchasing everything from pens and pencils right through to clothes, aircraft and prefabricated buildings. In the fiscal year ended March 31, 1976 the Supply Administration of the Department of Supply and Services contracted, on behalf of government departments and agencies, for the

purchase of 1.848 billion dollars¹⁵ worth of goods and services. The department plays a very central role in co-ordinating and administering over 44 percent¹⁶ of all federal government contracting. It should be noted that the importance of this department to the contractual activity of government stands in sharp contrast to the data presented earlier in this chapter, wherein contractual expenditures were accredited directly to customer departments. Indeed, it is the case that most of the goods procurement expenditures of the Department of National Defence go through the Department of Supply and Services.

Also of great importance to the contractual activities of the federal government is the crown agency corporation Defence Construction (1951) Ltd.¹⁷ The company's prime responsibility centers around the construction of defence projects. In this capacity the company supervises construction field work, administers new construction projects and administers the repair, maintenance or renovation of existing capital plants for the Department of National Defence. It is also responsible for the calling and review

¹⁵ Government of Canada, Department of Supply and Services, Biennial Review, 1976, p. 11.

¹⁶ Calculations based on data referred to in footnotes 14 and 19 for the fiscal year 1976.

¹⁷ Any substantive consideration of the contractual activities of Crown corporations falls outside of the scope of this study.

of all tenders and subsequent contract awards, in addition to arranging consulting contracts (engineering and architectural) for the department.

One of the most important regulatory bodies in government contract administration is the Treasury Board. Its role is to prescribe regulations, either general or specific, where it is empowered to do so by statute. It may give direction to government contractual activity by either discretionary or mandatory guidelines. Government Contract Regulations, issued as Orders-in-Council upon Treasury Board recommendation, govern such factors as the quantity and quality of goods and services required by or provided to the government. In addition, these regulations govern the methods of goods and service acquisition, including the choice of suppliers. Specific policies and guidelines are contained in a consolidated statement of Treasury Board contract policy, entitled Policy and Guidelines on Contracting in the Government of Canada, issued in June, 1975. The regulations contained in this document are supplementary to any statutory interpretation.

The next stage in this introduction to government contracting will be a consideration of the various types of contract with which the government is involved and the identification of those upon which this study will focus. There are essentially four major types of contracts with which the federal government deals. These are construction, goods, consulting service and non-consulting service contracts.

This study, in order to limit its scope and avoid unnecessary complexity, will concentrate primarily on construction and goods contracts to the exclusion of any detailed consideration of service contracts. Table 6 gives an indication of the importance of goods and construction contracts in various departments. Table 6 yields some interesting data. It would seem that the contractual activity of certain departments is concentrated in the area of goods procurement. This is particularly the case with regards to the Post Office and the Department of National Defence. Similarly, a great deal of construction contracting takes place within the Department of Indian Affairs and Northern Development. The table also reveals that two departments have a concentration of contractual activity in the area of service contracts. These two departments, both minor actors in the area of goods and construction procurement, are the Department of Manpower and Immigration and the Department of the Secretary of State.

The next step in the development of this chapter is to examine briefly the present trends in Canadian government procurement. To this end, the growth, economic significance and complexity of government procurement will be examined.

Government contracting has been a major component of government expenditure since World War II. Table 7 illustrates the growth of the government procurement function in Canada over the last decade both in terms of the total amount spent and as a percentage of total government expenditure.

TABLE 6

Rank Order of Departments Based Upon the Estimated Dollar Value of
Goods and Construction Contracts (in millions of dollars)¹⁸

Department	National Defence	Public Works	Transport	Post Office	Indian Affairs & Northern Development	Solicitor General	Environment	Manpower & Immigration	Secretary of State
Rank Order	1	2	3	4	5	6	7	14	15
Estimated Dollar Value of all Contracts ^a	1,148.1	533.7	358.3	234.6	337.4	194.8	189.8	325.0	90.7
Estimated Dollar Value of Goods and Construction Contracts	841.9	425.2	251.3	221.1	225.3	154.9	140.8	27.7	28.0
Estimated Dollar Value of Goods Contracts ^b	783.1	221.6	147.9	221.1	64.1	114.3	97.0	27.7	24.9
Estimated Dollar Value of Construction Contracts ^c	58.8	203.6	103.4	-	161.2	40.0	43.8	-	3.1

^aAs per Table 1.

^bThese values were calculated on the basis of expenditure columns 2, 5, 7 and 9 in the standard object of expenditure tables in the Public Accounts of Canada 1976. These estimates are judged to be high insofar as the categories mentioned, although appearing to be predominantly composed of goods expenditures, do contain service and construction contract expenditures.

^cThese are low estimates insofar as other categories include construction-related expenditures.

¹⁸Calculations are based upon data contained in: Government of Canada, Public Accounts of Canada 1976, Vol. 1, pp. 6.34-6.35.

TABLE 7

Government Procurement Expenditures Over the
Last Decade (in millions of dollars)¹⁹

Fiscal Year	Total Procurement	Total Government Expenditure	Total Procurement as a Percentage of Total Government Expenditure
1965-66	1,450.49	7,734.80	18.75%
1970-71	1,955.50	13,182.14	14.83%
1975-76	4,111.52	33,181.25	12.39%

The increase in contractual expenditure has risen since 1966 by a factor of 2.83.²⁰ This compares to an increase in total government expenditure over the same period by a factor of 4.29.²¹ This indicates that government procurement expenditures have declined as a percentage of the total budget by 1/3 over the last ten years.

When procurement expenditures are examined as a percentage of total expenditure there tends to be an inclination to underestimate the economic significance of government contracting. However, procurement expenditures are thought to generate more than their dollar amount through what is known as the "multiplier" effect (secondary and

¹⁹ Ibid.

²⁰ This figure represents a calculation based on data contained in Table 7.

²¹ Ibid.

related spending). In the United States, procurement expenditures are thought to generate three times their dollar amount.²² The Canadian figure is probably less insofar as a great deal of government procurement expenditure is directed at foreign owned or controlled companies, which may not choose to reinvest their earnings in Canada. The impact of government procurement on the nation's economic and social well-being does not end here. The awarding of a major contract can stimulate regional and local growth. On the other side of the coin a lack of government contracts might undermine long-established enterprises and even cause severe economic hardship in some communities.

Federal government procurement also plays a catalytic role in the economy. Many industrial and commercial enterprises have been spawned by the spinoff effect of technological breakthroughs prompted by government needs.²³ Government procurement also acts in small or large measure as a vehicle with which to achieve a variety of national, social and economic objectives. For instance, Canadian content can be promoted in the areas of labour, materials and profit; wages and employment conditions can be improved; equal employment standards can be introduced and regional employment opportunities can be created. Although the government may

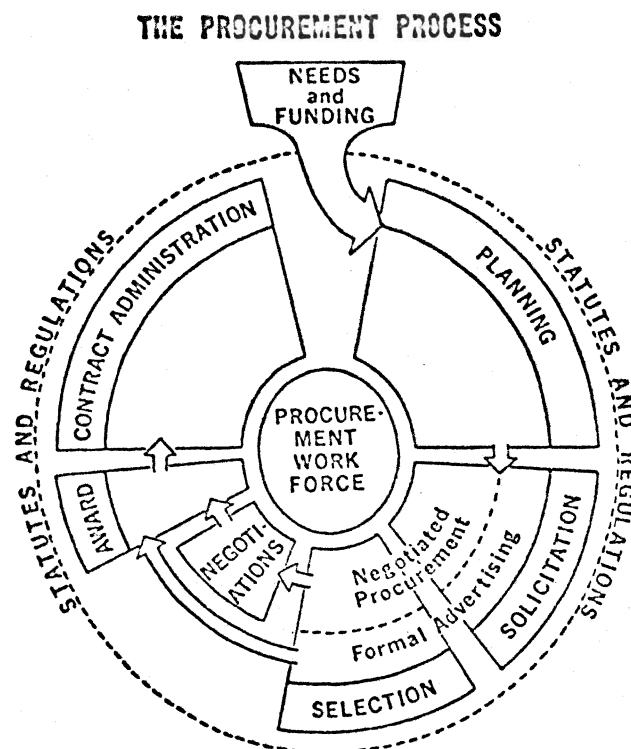
²² Government of the United States, Report of the Commission on Government Procurement, Vol. 1, p. 3.

²³ Examples of the spinoff effect may be seen in the work referred to in Footnote 22.

not always actively promote such national objectives through government procurement, the ability to do so remains.

As with any important and growing function of government, the procurement function has become increasingly complex. Despite efforts to centralize procurement under the control of common service departments, the procurement function is still widely spread among the various government departments. For instance, government departments are still responsible for contracting for their own service needs, and some departments such as the Department of Transport and the Department of Indian Affairs and Northern Development are deeply involved in construction contracting despite the existence of the Department of Public Works, a common service department geared to this purpose. Similarly, the responsibility for the procurement of goods is supposed to lie with the Department of Supply and Services, but it too is spread throughout the government - to a lesser but still significant degree.

The complexity of government contracting carries over from the institutional arrangements to the procurement process itself. Consider the conceptual diagram of the procurement process in the United States presented in Figure 1. It applies directly to the Canadian case.

FIGURE I²⁴

Needs and the authorized funds with which to meet these needs constitute the inputs into the process. Then, within the parameters of statutes and regulations, the process proceeds. The planning process encompasses the full range of product planning. This includes such considerations as source identification, requirement definition, method of acquisition and financial analysis. The planning stage is followed by the solicitation and selection stages. The

²⁴ Government of the United States, Report of the Commission on Government Procurement, Vol. 1, p. 2.

number of available suppliers determine whether a competitive situation exists and whether the contract will be competitively advertised or negotiated. Even in a competitive situation negotiations may take place in unusual cases in order to make the bidders more completely aware of government requirements within the tender. The contract award stage depicted in Figure I is followed by the final step in the process, the contract administration stage. The latter is essentially the monitoring, change and performance assessment stage.

Table 8, shown below, relates to the procurement of goods in Canada and demonstrates further the nature and complexity of the procurement process illustrated in Figure I. Table 8 gives a good indication of the multiplicity of factors and considerations that are involved in the product planning, solicitation and contract administration stages previously discussed. The complexity of the procurement process is even further compounded by distribution and total cost management considerations, where applicable.

TABLE 8²⁵

Elements of the Procurement Process (Goods)

PRODUCT PLANNING	ACQUISITION
<u>Economic and Market Analysis</u>	<u>Project Management</u>
Item profile assessment	<u>Contracting</u>
Industry sector analysis	Description of requirement
Customer analysis	Sourcing
Source identification	Price and availability
Source development	determination
Interprogram cost benefit	Bid solicitation
Optimization of PROC costs	Contract negotiation
	Contractor selection and
<u>Requirement Definition</u>	award
Determine need	<u>Contract Administration</u>
Value engineering	Monitor time, cost, performance
Procurement planning	Expediting and followup
Material identification	Design change or deviation
Specifications and	Contract amendment
standards	Quality assurance
Quality assurance	Delivery, acceptance and
requirements	payment
Statement of requirement	Termination and settlement
(TCP) (time, cost,	Cost Audit
performance)	Plant and personnel security
Estimating	
<u>Method of Supply</u>	
Make or buy	
Facility evaluation	
Regional or central	
acquisition	
Regional or central	
distribution	
Lease or purchase	
Consignment	
<u>PROC Financial Analysis</u>	

²⁵ Confidential and unpublished material, Government of Canada, Department of Supply and Services, 1975.

CHAPTER II

THE OBJECTIVES OF CONTROL

The need for effective control over federal government contracting becomes increasingly necessary as the procurement function of government grows and as the responsibility for government procurement is vested in more and more hands. However, before proceeding to examine the objectives behind control over government contracting, it is important to first explain the meaning of the word control and how it is used in this thesis.

The word control is taken to mean the exercise of authority for the purpose of ensuring and verifying that government conduct in the procurement of construction, goods and services does not exceed its statutory authority or fail to meet its objectives. Control entails authority, which in turn implies the power to command acceptance, belief and obedience based on the strength, virtue and power of one's position. Also implicit in the notion of control is the idea of influence. Influence implies the power of persons to consciously or unconsciously affect, direct, restrain or govern the actions and decisions of others.²⁶ Control is

²⁶ Some of the definitions in this paragraph were derived in part from Webster's New World Dictionary, College Edition (Toronto: Nelson, Foster and Scott, 1972).

further understood to have three important functions in government contracting:

- control sets standards or performance indicators to measure achievement
- control checks results or measures achievement
- control takes corrective or remedial action as required.²⁷

Thus, the word control, as it is used in this thesis, is applicable in both political and administrative contexts, includes the concepts of influence and authority, has three important monitoring functions, and is understood in terms of how well it meets its objectives.

The objectives of control are many and varied. The primary objective would appear to be the need for government to be accountable for the public trust. To this end, it is necessary that the government be able to justify its actions as being in the public interest. Other important objectives of control over government contracting include considerations of equity, economy, efficiency and effectiveness. According to the Department of Supply and Services, there are two overriding principles to be adhered to with respect to contracting:

- 1) Equity of opportunity to compete for government contracts must be afforded to all qualified suppliers.

²⁷ A. M. Willms, "Control in Government Administration," in A. M. Willms and W. D. K. Kernaghan, Public Administration in Canada: Selected Readings (Toronto: Methuen, 1968), p. 226.

- 2) The Administration must obtain fair value for the taxpayer's dollar.²⁸

The notion of obtaining fair value entails three concepts - economy, efficiency and effectiveness. The use of the word economy refers to the careful planned management of wealth and resources undertaken with a minimum of waste. Efficiency is a performance measure - it is the ratio of accomplishment over cost. When maximum production is achieved with given resources the best efficiency can be said to result.

Effectiveness is a measure of the extent to which an activity achieves an organization's objectives. Efficiency and effectiveness are closely related in that the more efficient an operation is the more effective it is likely to be. But insofar as one is dealing with the government, the most acceptable standard of achievement need not be the most efficient. The political and public acceptability of a service or production is often just as important to the public servant as maximizing efficiency.

The objective of equity is also an important element in government contracting. The government generally uses competitive bidding as a mechanism for ensuring equity.

The exceptions to this rule are when:

- 1) prices or sources of supply are determined by federal, provincial and other regulatory bodies; or
- 2) government objectives, operational requirements or administrative

²⁸ Confidential and unpublished material, Government of Canada, Department of Supply and Services, 1976.

- costs preclude competitive bidding; or
 3) true competition conditions do not exist.²⁹

In order to ensure that an adequate level of competitive response is achieved in contracting the Department of Supply and Services has created source lists and has engaged in the advertising of tenders.

Equity is an essential goal in a democratic system. It can be promoted by ensuring fairness and by ensuring high ethical standards through the avoidance of bribery, corruption, patronage, conflicts of interest and the like. It is fundamentally objectionable when a government plays favourites and runs counter to notions of fair play and assumptions of free competition. High on the list of government priorities is the need to maintain public confidence. And the public, although perhaps not able to understand many decisions taken by government, can usually recognize underhanded dealings. For this reason governments are always keenly conscious of the need to prevent what is known in the vernacular of the civil servant as a "horror".

The onus of responsibility to disclose to his superior potential conflicts of interest rests with the individual civil servant. An Order-in-Council dated December 18, 1973 concerning Public Servants Conflict of Interest Guidelines states further in this regard:

Upon appointment to office, public servants are expected to arrange

²⁹ Ibid.

their private affairs in a manner that will prevent conflicts of interest from arising.³⁰

The government has even undertaken to identify potential areas of conflict in the area of government contracting. These include:

- 1) awarding of contracts
- 2) purchasing of goods
- 3) inspection of goods
- 4) shareholding and/or silent partnerships in supplier companies, and/or family owned businesses
- 5) acceptance of gifts.³¹

In reference to the acceptance of gifts, the public servant is allowed to accept benefits provided that they are of a casual nature such as hospitality or a small gift item which is a normal expression of business courtesy. This would include a calendar or something similar which is a publicity item of a purely nominal value.

The Criminal Code of Canada has provisions relating to some of the more serious offences concerning the contractual affairs of government such as breach of trust, bribery, corruption and patronage. Section 296 of the Code makes it an indictable offence for any public trustee to intentionally defraud or violate his trust or put it to a use that is not authorized by the trust. An example of

³⁰ Confidential and unpublished material, Government of Canada, Treasury Board, updated to 1976.

³¹ Ibid. The areas listed are part of a larger listing of potential areas of conflict.

the latter instance is a public servant buying shares in a company which he knows is about to be awarded a large contract. Breach of trust provisions within the Code are limited to those people who fall within the definition of an official holding office and administering a trust. The employees of a company under contract to the federal government are not subject to these provisions.³²

The provisions concerning bribery and corruption of government officers are found in Sections 108, 109, 113 and 114 of the Criminal Code. Section 108 governs the acceptance by or offer to a Member of Parliament of a valuable consideration including employment in exchange for an omission or act done to procure such consideration for himself or another person. "The corrupt act does not have to be in connection with his legislative duties, it may be in connection with his participation in an administrative act of government."³³ Proceedings based upon this section of the Code may be instituted only upon the written consent of the Attorney General of Canada. Section 109 is similar to Section 108 except insofar as its applicability is

³²

J. Martin and I. Cartwright, Martin's Annual Criminal Code 1974 (Agincourt, Ontario: Canada Law Book Ltd., 1974), p. 64. See - R vs. Pruss, [1966] c.c.c. 315, 47 C.R. 358 (Y. T. Mag. Ct.).

³³

Ibid., p. 61. See - R vs. Bruneau, [1964] c.c.c. 97, 42 C.R. 93 (ONT. C.A.).

limited to public officers and the written consent of the Attorney General of Canada is not necessary to institute proceedings.

Sections 113 and 114 deal with the selling and purchasing of offices and the influencing and negotiation of offices, respectively. Section 113 refers to the direct sale or purchase of an appointment, resignation or consent, or the promise thereof, for remuneration, contractually related or otherwise. Section 114 refers to the granting of assistance, co-operation or influence in the form of solicitation, recommendation or negotiation for any kind of consideration, reward, advantage or benefit. The transgression of any of these laws governing bribery and corruption constitutes an indictable offence under the Criminal Code.

Section 110 of the Code deals directly with matters of patronage. Under the provisions of this section it is an offence if one:

- (a) directly or indirectly
 - (i) gives, offers or agrees to give or offer to an official or to any member of his family, or to anyone for the benefit of an official, or
 - (ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person, a loan reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with
 - (iii) the transaction of business

- (iv) relating to the government, for a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be.³⁴

Also included in this section are provisions relating to the offer of a consideration to a Minister of the Crown or an official in order to secure co-operation, assistance, influence or an omission in connection with the granting of a government contract. It is also an indictable offence under Section 110 for anyone to subscribe a valuable consideration upon a candidate or class of candidates for the Parliament of Canada for the purpose of obtaining or retaining a contract with the government.

The provisions of the Criminal Code of Canada are vital to the protection of equity in the contractual affairs of government. They are often supplemented by government or departmental regulations. Although the provisions of the Code tend to be general, their applicability with respect to the promotion of equity in government contracting is readily discernible.

Also entailed in equity is the notion of fairness. The government, when contracting, does not seek the best deal it can at the expense of being fair. Indeed, the

³⁴ Ibid., p. 62.

government will even go so far as to consider allowing extra payment on an awarded contract in certain circumstances:

- 1) When the Crown by action or omission causes extra or abnormal costs to the contractor.
- 2) When special engineering and technical difficulties that could not have been foreseen occur.
- 3) When major significant damages are caused by an Act of God and the contractor is in no way at fault.³⁵

The other prime objective of control over government contracting is the desire to ensure economy, efficiency and effectiveness in the procurement function of government. To this end, the objectives of the government procurement function include:

- 1) cost reduction or profit-making
- 2) control of financial commitments
- 3) control of negotiations
- 4) provision of information and assistance in the specialized purchasing field, to management and other groups.³⁶

The government has tackled the problem of trying to ensure that best value has been received for each dollar spent by recommending, where appropriate, the use of an elaborate financial analysis tool for total cost management referred to as the Product Resource Operating

³⁵ Confidential and unpublished material, Government of Canada, Department of Supply and Services, 1976.

³⁶ G. W. Aljian, Purchasing Handbook, 2nd edition (Toronto: McGraw-Hill, 1966), pp. 1-5.

and Contingent Cost method or more simply PROC. The Treasury Board sees PROC as an effective mechanism with which to "achieve the optimal combination of quality, time and total life-cycle costs of the acquisition."³⁷ The Treasury Board has made reference to and explained PROC in the following form:

When the nature of the acquisition is such that an analysis to determine best value is appropriate, this analysis should determine the optimum total cost of each available option by considering each of the following elements:

- (a) Product Cost, that is the direct cost of goods and services delivered or the cost of construction and/or leasing of property. Usually this is the equivalent of the basic contractual price. However, it should also include the cost of transportation and installation at the point of use;
- (b) Resource Cost, that is, the indirect cost within the requisitioning department and/or common service agency of supplying or acquiring goods and services and carrying out construction and/or leasing of property. This can include such resources as design, preparation of specifications, contract administration and quality assurance;
- (c) Operating Cost, that is, the cost of operating, maintaining and repairing the acquisition throughout its useful life, plus consideration of residual value at the time of retirement. The useful life should be related to the need for the

³⁷ Government of Canada, Treasury Board, Policy and Guidelines on Contracting in the Government of Canada, June 1975, p. 5.

acquisition and may be different than its expected technological or physical life;

- (d) Contingent Cost, that is the cost to the user of not having the right goods, services or facility provided at the right place at the right time. This can include costs incurred while waiting for delivery as well as an assessment of the likelihood of failure and the costs, additional to the cost of repair, that would be associated therewith. The minimization of this cost requires sound pre-planning, contract administration and, where appropriate, project management, so that situations of urgency or unnecessary delay are avoided where possible. The consideration of contingent costs may also affect the levels of quality and performance as outlined in the definition of requirements.³⁸

There is one additional objective of control over government contracting. This objective is to ensure, whenever appropriate, that government contracting relates to national policies and objectives. This involves such activities as contributing to regional development and the existence of a competitive market. It also involves promoting government procurement policies based upon such considerations as the amount of Canadian content present in a product. It should be noted, however, that the promotion of such socio-economic goods may not always be consistent with the other objectives of control.

The objectives behind control over government contracting are nicely summed up in the following Treasury Board policy statement:

The purpose of Government procurement is to acquire goods and services and carry out construction and leasing, through the contracting arrangements that best satisfy specific program requirements of the Government of Canada. Government contracting shall be conducted in a manner which will:

- (a) achieve the optimal combination of quality, time and total life-cycle costs of the acquisition;
- (b) reflect fairness in the spending of public funds; and
- (c) when appropriate, relate to national policies and objectives.³⁹

³⁹ Ibid., p. 5.

CHAPTER III

IMPEDIMENTS TO CONTROL

This chapter examines certain major problems in government contracting which act to hinder the attainment of the objectives discussed in Chapter II and thereby reduce effective control over government contracting by the government departments and agencies concerned. It is the purpose of this chapter to provide a foundation for a consideration in subsequent chapters of the instruments of control and their effectiveness.

Government contracting policies and procedures have been continually refined over the years. Even the contractual documents have, as in the case of the standardized construction contract, been subject to constant revision and improvement. Yet despite all the effort that has been made to improve the government procurement system, problems still exist. This chapter will examine three such problems which impede the exercise of control over government contracting. These problems, expressed in terms of the objectives of control, are:

- 1) cost control,
- 2) the maintenance of fairness and justice in the procurement process,
- 3) the introduction of socio-economic goals which are

incompatible with traditional procurement standards.

Cost Control

The most common problem associated with cost control appears to be the problem of defining need. Basically, this problem is also one of common service agency and customer department relations. For instance, in the area of goods procurement, a customer department may order a certain number of model XY calculators. The Department of Supply and Services is then faced with the problem of reducing cost. Does the customer department really need model XY or would model Z do? Or can the department use model Q which is available at a lower price because several other departments have ordered it? The problem is thus one of the department giving specific as opposed to performance specifications.

Customer departments often frustrate the objective of obtaining best value by submitting single source requests. This usually occurs in response to companies efforts to promote their brand name within a department.⁴⁰ Another of the reasons why so many single source requisitions⁴¹ are

⁴⁰ The result of this salesmanship is often wasteful purchasing. This is the case with the procurement of calculators. Programmable calculators are sitting on the desks of people who don't know how to use them. Sources confidential: Departments of National Defence, Supply and Services and Public Works, Government of Canada.

⁴¹ An estimated 35% of all supply contracts and 60% of non-competitive supply contracts are thought to be single source requests by the department concerned. This estimate was said to be conservative. Source confidential, Department of Supply and Services, Government of Canada, Ottawa, August, 1976.

sent to the Department of Supply and Services seems to be the need of departmental purchasing officers to exercise some power. The only area of decision left to them is that of defining needs.⁴² And they certainly don't want their power eroded any further.⁴³ The tendency toward infighting and empire building within the civil service is too strong to allow that to happen.

In an effort to keep customer departments happy the Department of Supply and Services will occasionally send tenders to the departments for them to make a decision on.⁴⁴ In so doing the equity of the procurement process falls into jeopardy. For example, imagine the Department of Supply and Services contracting on behalf of the Department of National Defence for ammunition crates with a strength of 100 p.s.i. The low bid that is received is for crates with a strength of 99 p.s.i. So if one sends the tenders back to the customer department for a decision one is really being unfair to the other suppliers insofar as the original specifications stated the requirement to be for a 100 p.s.i. crate. This sort of problem also occurs with delivery dates.

⁴²The Department of Supply and Services sometimes goes back to customer departments in order to see if a change in quality or type would be acceptable.

⁴³The Department of Supply and Services can fight customer departments up to a point but beyond that they would create too much bad will.

⁴⁴It should be noted that such action is contrary to the department's policy and is considered to be a rare occurrence.

A customer department's delivery date may be unrealistic. Given another week a supplier might be able to give a much better price as he would perhaps not be rushed so much. Or what happens if the low bid includes a delivery date that is two weeks later than the one requested? The objectives of best value and equity are thus often at odds with each other.

Another important question related to cost control is when direct use of the private distribution system should be made. The question is whether the government should rely on its own resources or rely on the private sector for the provision of goods and construction. It is often the case in construction that the private sector is faster and less expensive than Crown construction. And in the area of goods procurement it is often the case that the private sector can, where economies of scale do not apply, supply government departments directly and economically with stationary and similar needs, thus avoiding the high overhead costs within the Department of Supply and Services. It would often appear more cost effective to purchase such materials from the parallel private distribution system, where one need only walk down the street to pick up what one needs.

And this leads one to the question of common service department cost recovery. Consider the Department of Supply and Services. The average administrative cost at headquarters is \$400 for a commercial contract and \$1200 for a scientific contract. This compares with an average administrative cost

of \$36 per contract in the regions.⁴⁵ There are several reasons why the Department of Supply and Services has such a high overhead and why cost recovery is such a problem. First of all there are price and availability requests where individuals want to decide if their department can afford a certain item.⁴⁶ There are also the long and intensive technical negotiations for something like the Long Range Patrol Aircraft (Orion renamed Aurora) for which a contract might never result. And finally, there is the problem of contract cycle fluctuations, where certain personnel may be left with relatively little work pending the arrival of another large and involved contract in their area of expertise. All of these factors contribute to the high overhead in the Department of Supply and Services and to their inability to recover administrative costs⁴⁷ from customer departments.

Another major problem associated with cost control is financial mismanagement of government contractual resources. A common variant of this problem is duplication

⁴⁵ Based on data in 1976 study, source confidential.

⁴⁶ The Department of Supply and Services can charge an administrative fee for its contracting services only when a contract has been issued.

⁴⁷ Administrative charges vary from no charge to a customer department for a contract resulting from a national master standing offer to a 6% charge on the value of a contract for a scientific purchase valued under \$10,000. Source confidential.

of effort, the net result of which is increased expenditures or manpower requirements. Such duplication is often found to be the product of communication problems within the bureaucracy. A case in point is the effort expended on a contract by a building project manager who was unaware that the government had a standard construction contract.⁴⁸ Contract changes and amendments may also result in duplication of effort. For example, a contract may be awarded for the construction of a new prison. During construction a new deputy minister or Minister may assume office in the department concerned. He or she may have new ideas on the philosophy of housing prisoners. As a result, contract changes may be instituted necessitating a costly re-evaluation of building requirements. Duplication of effort can also result in those areas in which functional overlap exists.

Financial mismanagement may also be seen in terms of a lack of planning and co-ordination with respect to government procurement activities. The classic horror story illustrative of such a case is the construction of the new Post Office Terminal in Toronto.⁴⁹ The automated equipment design was changed without co-ordinating these changes with the structure of the building. As a result, conveyor belts

⁴⁸ As related by S. Ings, Contract Policy and Administration, Department of Public Works, Government of Canada, Ottawa, July, 1976.

⁴⁹ Source confidential, August, 1976.

ran into brick walls and lighting fixtures. It was an unqualified disaster. Another example illustrative of inadequate communication and co-ordination is the case of a construction delay involving a series of buildings being erected by the Department of Indian Affairs and Northern Development.⁵⁰ The delay was caused because the nails had not arrived at the construction site. The Department of Supply and Services had contracted for all the building materials, but the nail supplier hadn't sent his order as he was awaiting more orders for that area to save shipping costs. Both these examples demonstrate the need for better communication and co-ordination in government procurement.

Fairness and Justice

Another impediment to control over federal government contracting is the problem of maintaining fairness and justice in the procurement process. This entails not only preventing graft, but maintaining equitable administrative practices and procedures.

In the interests of a just procurement system, it is necessary to prevent conflicts of interest from arising⁵¹ and to deter those in authority from misusing their office, being subject to bribery and corruption and engaging in

⁵⁰As related by Mr. W. Allen, Contracts and Construction Management Division, Department of Indian Affairs and Northern Development, Government of Canada, Ottawa, August, 1976.

⁵¹The Skyshops affair is an example of a case which involves conflict of interest, misuse of office and bribery.

patronage.⁵² The Criminal Code of Canada has provisions making it a criminal offence to engage in such activities. However, the law alone cannot act as an effective deterrent. It must be supplemented by discovery and enforcement in order that it might pose a credible threat to a potential offender. And if the Skyshops and Harbourgate affairs are any indication, a great deal of illicit contractual activity may have gone unnoticed over the years.

In addition to preventing graft, it is important that the procurement system maintain equitable administrative practices and procedures. It is often the case that certain government departments have no set procedures for dealing with contractual problems involving questions of fairness. For instance, a \$2,000 contract might be sent to 44 firms to bid on and only 4 firms may reply. Due to a delay the tenders lapse. Should the offer be reissued to all 44 firms? In the case of a \$2,000 contract does going to so many firms in the first place make any sense? And secondly, should procedures be so rigidly defined as not to allow for common sense? A procedure is subject to a certain reasoning and if the civil servant understands that reasoning he can better exercise discretion in those circumstances where its application is warranted.

⁵² It should be noted that patronage is often difficult to distinguish from legitimate responses to genuine needs. This is particularly true with respect to public works which are aimed at a particular constituency, region or segment of the population.

Procurement procedures are also subject to communication problems which prevent the system from functioning properly. For example, in construction contracting, addendums⁵³ are often issued during the tendering stage for contractors to bid on. It is not uncommon for one or more contractors to fail to bid on the addendum or claim not to have received it.⁵⁴ The equity of the procurement system is thus put in jeopardy.

Numerous instances exist in which the fairness of procurement procedures might be questioned. To illustrate this, imagine a highway construction project. Contractor X is awarded a contract to build a section of highway from Point A to Point B. During construction the government decides to extend the highway to Point C. The government, assuming contractor X would incur the lowest construction costs, as he has everything set up on the job site already, negotiates a price with him for construction of the highway extension. By not calling tenders in this case, the government has frustrated the attainment of the objective of equity within the procurement system.

The translation of policy into practice can also present a formidable obstacle. For example, there is a tendency to want to remain with old and trusted suppliers

⁵³ Addendums are additions or supplements to the original contract.

⁵⁴ As related by L. L. Dixon, Contract Policy and Review, Transport Canada, Government of Canada, Ottawa, August, 1976.

and contractors rather than accept new ones, even when savings can be realized.⁵⁵ Such a practice runs counter to the principles behind control - equity and best value - and thereby hinders effective control over government contracting.

Socio-Economic Goals

The final problem to be discussed in this chapter is that of the introduction of socio-economic goals which are incompatible with traditional procurement standards. Such goals are said to be incompatible when they are inconsistent with the primary objectives of equity and best value. Although socio-economic goals must at times receive priority, they are often best promoted by other means and should not needlessly undermine other important objectives of control. In this context, this chapter will now undertake to examine instances of conflict between particular national socio-economic goals and the objectives of equity and best value. The national goals to be examined in the context of government contracting are the promotion of Canadian content in product procurement and the promotion of regional equality in economic development.

One of the foremost national goals in Canada is the promotion of Canadian content in product or goods procurement. The Department of Supply and Services has established four priority groups with respect to the promotion of Canadian

⁵⁵ Sources confidential, Department of Supply and Services and Department of Public Works, Government of Canada, Ottawa, July and August, 1976.

content in the selection of suppliers. The four groups in order of priority are:

- 1) Canadian manufacturers,
- 2) Canadian based agents of foreign or Canadian companies (with followup after sales service).
- 3) Canadian based companies acting as agents for Canadian or foreign manufacturers,
- 4) foreign manufacturers.⁵⁶

One will note that foreign producers are not invited to bid on a contract when there are an adequate number of Canadian based sources of supply.⁵⁷ In creating these priority groups the Canadian government has seen fit to sacrifice equity in the procurement process and forego the opportunity of obtaining better value for the taxpayer's dollar.⁵⁸

The four priority groups help guide Department of Supply and Services' contract administrators in the selection of suppliers. However, in the evaluation of tenders another Canadian content rule comes into play. It is commonly referred to as the 10 percent difference in foreign content

⁵⁶ Confidential and unpublished material, Government of Canada, Department of Supply and Services, 1976.

⁵⁷ The Canada-United States Defence Production Sharing Programme and the resulting interdependency in the area of defence production is an important exception to this rule.

⁵⁸ Lowest cost is not the sole criteria for determining best value. Other considerations such as increased tax revenues and the effects on welfare and unemployment expenditures should be, but are often not considered.

rule. This rule works in the following way:⁵⁹

FIGURE 2

10 Percent Difference in Foreign
Content Rule Illustrated

<u>Bidder A</u>	<u>Bidder B</u>
Bids \$1.03 per unit	\$1.00 per unit
Canadian content \$.50	\$.10
Foreign content \$.50	\$.90

Difference in Foreign Content $\$.90 - \$.50 = \$.40$

10 Percent Difference in Foreign Content $10\% \times \$.40 = \$.04$
= 4 cents

Therefore, Bidder A wins as his bid can be as high as \$1.04
(\$1.00 plus \$.04 = \$1.04).

One must remember that other factors such as quality and maintenance considerations come into play. Consequently, the 10 percent difference rule is rarely effective in changing an award.⁶⁰

One encounters a number of problems in applying this rule. One such problem is that the expense of an audit tends to prevent effective verification of a firm's

⁵⁹ Source confidential, Department of Supply and Services, Government of Canada, March, 1977.

⁶⁰ Ibid.

estimate of domestic and foreign content in its product. Consider the following example of how the equity of the procurement process was undermined. A certain firm had been given a contract to supply fruit juice to a government department. Although the pulp came from a far Eastern country, the product was of high Canadian content insofar as Canadian water was used in its manufacture.⁶¹

The Department of Supply and Services tends to depend "on complaints from competitors and the ethical standards of the firm to ensure accurate representations of domestic content. [To this end,] competitors in a tender are allowed to know the name and price quoted by the winning tender."⁶² Other major departments in the procurement field, such as the Department of Public Works, are also subject to this method of verification.

Not all departments have a formula that they can apply to the question of Canadian content. Most departments use discretion in awarding a contract on the basis of Canadian content. The exercise of discretion indicates less control over government contracting but tends to be limited to those tenders which are fairly equal in terms of such factors as quality and cost. A big drawback with respect to exercising discretion on the Canadian content

⁶¹Source confidential, Department of Supply and Services, Government of Canada, Ottawa, July, 1976.

⁶²K. Stegemann and K. Acheson, "Canadian Government Purchasing Policy," in Journal of World Trade Law, Vol. 6 (1972), No. 4, pp. 460-461.

question is that one can seldom be sure that the criterion of Canadian content is not being used as a justification for political patronage. This does not sound so far fetched when one considers that in 1969, when the Department of Supply and Services took over the Department of Public Works' supply lists, they found them to be constructed on a partisan political basis.⁶³

The final socio-economic goal to be examined is the promotion of regional equality in economic development. This goal tends to conflict with the objectives of equity and best value. The procurement of uniforms is a case in point. The Department of Supply and Services supplies cloth, stored in its warehouses, to firms for the manufacture of government uniform requirements. The department offers the following explanation for this procedure:

the armed forces specify material which is different from the commercially available cloth. DSS then tries to buy quantities of cloth large enough to warrant minimum mill runs in order to keep down cost. They store the cloth and supply it to manufacturers of shirts whenever the shirts are needed. We have been told that "small business" considerations are a factor in this policy. DSS could place larger orders for shirts and have the manufacturer arrange for economical procurement of cloth made to DND specifications. However, small needlework manufacturing firms complained that DSS was favouring large producers. For this reason,

⁶³ sources confidential.

DSS is splitting up the orders of shirts into batches which can still be made economically and provides the cloth for which larger quantities are required to be ordered to exploit economies of scale.⁶⁴

This policy ensures the purchase of Canadian-made cloth,⁶⁵ but only at the expense of not using low cost imported cloth, which may often represent the best value. The reliance of certain geographically deprived areas on the textile and related industries for employment opportunities seems to be the basis of this procurement policy, insofar as the existence of regional economic disparities poses a threat to national unity, not to mention the future electoral success of the majority party. However, it would appear more appropriate to employ tariff rather than procurement policies as the means by which to afford protection to the textile industry.

Regional considerations can also come into play in the negotiation of a contract. A large contractor can be directed to disburse some of his subcontracting work to regionally depressed areas. There is evidence to suggest that such influence was exercised by the Department of Defence Production in the early 60s,⁶⁶ but the extent to

⁶⁴Stegemann and Acheson, "Canadian Government Purchasing Policy," p. 463.

⁶⁵The Department of Supply and Services tends to invite only Canadian tenders when purchasing cloth.

⁶⁶Stegemann and Acheson, "Canadian Government Purchasing Policy," p. 473.

which it exists today is not known. Although the Department of Supply and Services maintains that contracts are not given out on the basis of regional considerations, "some of the directives issued to the department have been clearly motivated by the desire to alleviate the problems of depressed regions through increasing the sales of declining industries located in the regions."⁶⁷ The protection afforded the textile, clothing, shoe and shipbuilding industries illustrates this point.

National socio-economic goals are based on totally different conceptions than those relating to procurement. Consequently, it is not surprising that they frequently conflict with the objectives of equity and best value. The OECD Working Group on Government Purchasing has stated in this regard:

The notion that government purchasing can be used as an instrument to support and give effect to other government programs is not new. Indeed, it has been practised in a small way for many years. Witness the present deviation from the concept of purchasing exclusively for economy in product cost. However, it is not feasible for government purchasing to be used simultaneously to support various programs with widely differing concepts.⁶⁸

⁶⁷ Ibid.

⁶⁸ Memorandum of C. L. Brown, Director, Purchase Research Group, OECD Working Group on Government Purchasing, March 5, 1971, p. 13.

The introduction of certain socio-economic goals to the procurement process may thus be deemed incompatible with traditional procurement standards inasmuch as these goals act to impede the exercise of control over government contracting by frustrating the attainment of the objectives of equity and best value.

It should be noted that some socio-economic goals are compatible with the procurement function of government. A case in point is the recent federal-provincial agreements, whereby the federal government contracts for certain goods on behalf of those provinces party to the agreement. The primary objectives of the provinces with respect to the agreements is to obtain a better price for goods through the economies of scale offered by centralized purchasing.⁶⁹ The federal government, through these agreements, helps reduce the costs of government for provinces like New Brunswick and thus helps to combat regional disparities. Thus, it would seem that government procurement should take account of national goals, but should contribute to them only when other means are not available or feasible. In so doing, the objectives of equity and best value would not be needlessly undermined.

Conclusion

To conclude, three problems pertinent to the

⁶⁹ A recent example is a contract with Outboard Marine Corporation for the supply of outboard engines to the various provincial departments, such as the New Brunswick Department of the Environment.

objectives of control have been examined. The first, cost control, was considered in terms of administrative problems and financial mismanagement. The former included the problem of needs definition, as well as questions concerning cost reduction and cost recovery. The latter dealt with problems of duplication and inadequate planning. The problem of maintaining fairness and justice in the procurement system centred on an examination of graft (including conflict of interest, misuse of office, bribery, corruption and patronage), and the maintenance of equitable administrative practices and procedures. In the latter instance it was noted that a discrepancy often exists between policy and practice. The final problem which was examined was that of the introduction of socio-economic goals which were incompatible with traditional procurement standards. Two examples were considered in this context. One involved the promotion of Canadian content in product or goods procurement, the other, the promotion of regional equality in economic development. Consideration was also given to socio-economic goals which were compatible with the procurement function of government. It was concluded that government contracting should take such goals into account, but promote them only when other means are not available or feasible. In so doing, the objectives of equity and best value will not be needlessly undermined.

PART II

SOURCES OF CONTROL

INTRODUCTION TO THE SOURCES OF CONTROL

Chapters IV to VII deal with a variety of control mechanisms governing federal government contracting in Canada. A taxonomy of these sources of control is outlined in Table 9 below.⁷⁰

The controls and influences over Canadian federal government contracting are divided into four major categories, which were chosen on the basis of their function and relationship to government. These include parliamentary, executive, administrative, and legal and judicial forms of control. Each of these categories, and the control mechanisms subsumed under it, constitute the basis of one of the succeeding four chapters.

It will be the purpose of the forthcoming chapters to examine how the various control mechanisms exercise control and to assess their effectiveness in terms of their ability to deal with contractual problems and advance the objectives of control. These chapters will also put forward recommendations as to what steps might be taken to improve control over government contracting.

⁷⁰ The sources of control to be considered in the forthcoming chapters are applicable to government control over financial administration in a general sense and are not exclusive to the area of government contracting.

TABLE 9

Controls and Influences Over Canadian
Federal Government Contracting

<u>Major Category</u>	<u>Control Mechanism</u> ⁷¹
Parliamentary Controls	question period and debate parliamentary committees (in general) the estimates the Public Accounts Committee the Auditor General
Executive Controls	the Prime Minister the Cabinet (including the role of individual ministers) the Treasury Board Secretariat
Administrative Controls	centralization by means of common service departments the determination of levels of contractual authority the contractual document
Legal and Judicial Forms of Control	statutory law the courts

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No major consideration of pressure groups will be undertaken in this study. The reason for this is that the activity of interest groups tends to be diffuse and detailed information on their operations is not readily available. However, references to interest group activity can be found at several points in this study.

CHAPTER IV

PARLIAMENTARY CONTROLS

This chapter explores the basis of parliamentary control over government financial administration and examines those legislative control mechanisms relevant to a consideration of government contracting. These include:

- 1) question period and debate
- 2) parliamentary committees (in general)
- 3) the estimates
- 4) the Public Accounts Committee
- 5) the Auditor General.

The purpose of this chapter is to assess the effectiveness of these control mechanisms with respect to their ability to advance the objectives of control.

The ultimate legal control over all matters of financial administration, including contracting, is vested in Parliament. Its sovereignty in the area of financial affairs stems from two principles. The first is that the executive shall have no income other than that sanctioned by Parliament. This is to say that all appropriations, and all authority to generate revenue must originate in the House of Commons. The second principle imposes on the executive an accountability for the uses to which monies

appropriated by Parliament are applied. This principle states that the executive shall not undertake any expenditure without the approval of Parliament and shall make expenditures only in ways approved by Parliament.

Parliamentary control over finance assumes that Parliament is able to effectively oversee and control the activities of the executive branch of government. However, this does not appear to be the case. Although Parliament has the last word in the process, it does not appear to be privy to a great deal of what goes on in the administration of government. This lack of knowledge tends to relegate administrative considerations to the background in favour of more generalized policy-oriented concerns. Contractual matters tend to be given detailed consideration only when graft or financial mismanagement are involved. More often than not such issues become fodder for the opposition's cannons. Recent examples include the dredging scandal, the Lockheed Orion deal and the Skyshops affair.

One of the primary functions of Parliament is to provide a forum in which public grievances may be discussed and remedies found. To this end, Parliament provides opportunities for questions and debate. Two such important opportunities are oral question period and opposition days.

Oral question period is a forty minute period of open criticism that the executive is unable to avoid. It attracts a large turnout among members of Parliament as it offers the possibility of direct participation. The

executive is often unaware of what questions will be asked and the opposition, for its part, tries to select questions that afford them potential political benefit and attract press coverage. To this end, "most questions are orchestrated for the sole purpose of embarrassing the government."⁷² These questions, as they apply to government contracting, often tend toward the sensational, concentrating on such issues as graft and financial mismanagement.

Question period⁷³ enables the opposition parties and their members to exercise some degree of control over government contracting insofar as their efforts, at times, bring to light important contractual details which were not previously known or considered to any extent. However, the information that the opposition uncovers is largely dependent on where they choose to look and what questions they choose to ask. They are thus put in the role of detective, often not knowing what they are looking for or what they will uncover. However, their efforts are supplemented by a modest research staff. And this research staff has been effective in helping reveal the Skyshops affair,⁷⁴ a

⁷² R. J. Jackson and M. M. Atkinson, The Canadian Legislative System (Toronto: Macmillan, 1974), p. 93.

⁷³ Another important mechanism through which the opposition can obtain information are orders for return (written requests for information).

⁷⁴ The source of this information is a CBC national news broadcast, 11 o'clock edition, aired on February 1, 1977.

contractual problem involving equity within the procurement process.

The opposition is given a number of opposition days in each session of Parliament⁷⁵ wherein they are free to decide the agenda. They are allowed to present motions on any matter falling within the jurisdiction of the Parliament of Canada. However, "in practice the parties merely divide the opposition days among themselves and use the opportunity to force debates on topical motions which deplore the government's behaviour or urge a particular course of action."⁷⁶ Even during normal House debates attention is seldom focused on administrative matters.

On those occasions when contractual matters are considered by the House, attention tends to centre on situations in which graft or financial mismanagement are suspected. A case in point is the multi-million dollar Terrasses de la Chaudière project in Hull, undertaken by the Department of Public Works. Through the efforts of Conservative M.P. Ron Huntington (Capilano) it was revealed that the contract had not been subject to public tendering.⁷⁷

⁷⁵ The opposition parties are accorded a total of 25 opposition days (plus 3 days for supplementary estimates) per session. These days are designated by the house leaders and divided unequally among the three supply periods.

⁷⁶ Jackson and Atkinson, The Canadian Legislative System, p. 94.

⁷⁷ "Conservative MPs Petition Cabinet to Drop Campeau Deal", St. Catharines Standard, Nov. 5, 1976, p. 19.

The equity of the procurement process had been sacrificed. Major discrepancies and inconsistencies relating to contract interpretation were also revealed. And the cost of the contract was raised as a matter of concern, inferring financial mismanagement on the part of the government.

Mr. Huntington and three other Conservative Members of Parliament presented a formal petition to Parliament on November 4, 1976 asking that the government cancel the lease-purchase agreement governing the Terrasses de la Chaudière project before December 1, 1976 at which time the first monies were due from the contractor's bondholders.⁷⁸ Prior to December 1, 1976, Conservative Members of Parliament rose on several occasions pursuant to Standing Order 43⁷⁹ in order that the House might vote to cancel the agreement.⁸⁰ However, they failed to obtain the necessary unanimous consent of the House. The government continued to deny that any problem existed.

Parliament can be an effective control over government contracting in certain cases. As a public forum, it can focus public opinion on contractual situations in which the objectives of equity and fair value are lacking so that they might be realized in subsequent cases. The media is a

⁷⁸ Ibid.

⁷⁹ Standing Order 43 is a procedure to bring an emergency motion before the House. The unanimous consent of the House is needed to proceed.

⁸⁰ This information was gleaned from Hansard over the period November 4 to December 1, 1976.

valuable supplement to opposition efforts in this regard. It provides a valuable source of information to Members of Parliament, as is evidenced by occasions of investigative reporting on problems involving government contracting and by constant references in the House to information contained in 'this morning's newspaper'. As a matter of fact, it was a report in the Toronto Daily Star that helped to prompt an investigation into the financial mismanagement surrounding the refit of the aircraft carrier HMCS Bonaventure.⁸¹ By continually harping at a minister in the press or in the House, opposition members can often help a story unfold, whether it is the Skyshops affair or the dredging scandal. Indeed, the press coverage accorded the dredging scandal prompted the federal government to review and improve its dredging contracts in an effort to prevent such fraud in the future.⁸²

Although it is able to affect the procedures and substance of contracting in certain cases, Parliament tends to be a relatively ineffectual control over government contracting.⁸³ The primary reason for this situation is

⁸¹Canada News Facts (Toronto: Marpep Publishing, 1969), p. 244.

⁸²As related by A. Macintyre, Group Chief Contracts Policy, Treasury Board, Government of Canada, Ottawa, July, 1976.

⁸³For a discussion on the general lack of control exercised by Parliament see - David Hoffman, "Liaison Officers and Ombudsman: Canadian M.P.s and Their Relations with the Federal Bureaucracy and Executive," in Thomas A. Hockin (editor), Apex of Power (Scarborough, Ontario: Prentice-Hall, 1971), pp. 153-154.

that contractual affairs are given little, if any, consideration in the day-to-day deliberations of Parliament. The opportunities for question and debate, on the whole, do not seem to reflect an adequate concern for contractual problems. This is perhaps due to the difficulty in obtaining information about such matters. Additional research staff and further specialization on the part of opposition members might help in this respect.

The second control mechanism to be discussed is parliamentary committees. An important function of these committees is to oversee the activities of the executive. Their role in this regard is limited inasmuch as they can act only on that which is referred to them by Parliament. Consequently, their activities, with regard to contracting, tend to be limited to scrutinizing the estimates of the department with which they are concerned. Inquiries tend to be of a general nature, reflecting an absence of detailed investigation. "Committees meet irregularly and their members pose few questions which concern the cost of government programs, rarely admonish ministers, and even less frequently reduce specific expenditure items."⁸⁴ With the exception of the Public Accounts Committee, contractual matters are seldom discussed in parliamentary committees.

The following comment by a member of the House Standing Committee on Transportation and Communication with

⁸⁴Jackson and Atkinson, The Canadian Legislative System, p. 89.

reference to that committee illustrates why matters of a more involved nature, like contracting, are given inadequate, if any consideration:

I must say that as a member of this Committee I am very disturbed by the inaction of this Committee As one who has been sitting on this Committee for quite some time, I am disturbed to note that we have met on only three occasions in this particular Parliament, on one occasion to table the Minister's statement and to hear from the officials of the Ministry of Transport. I believe two or three of the Committee members at that time were given an opportunity to ask the Minister some questions regarding this very important department. On the other two occasions we had the CTC, Mr. Benson and his colleagues, appearing before the Committee A month has transpired and we really have not scratched the surface in the examination of these particular estimates. We have another month to go and by the end of May the estimates are deemed to have passed.⁸⁵

This statement reflects the fact that standing committees, both in the House and in the Senate, often neglect to consider the kind of administrative detail which tends to surround the contractual activity of government. This is in sharp contrast to House and Senate committees in the United States which spend a lot of their time examining government

⁸⁵ Quoting Mr. Mazankowski, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Transport and Communications, second session, 29th Parliament, April 25, 1974, pp. 4.4-4.5.

procurement activity.⁸⁶ It would thus appear that most parliamentary committees exercise little, if any, control over the contractual affairs of government.

The third control mechanism to be discussed in this chapter is the estimates. They represent the government's projected spending patterns for the upcoming fiscal year. They are important as a control mechanism in two aspects. First, they provide the government with centralized control over contractual and other departmental expenditures. And second, they provide Parliament with the opportunity to scrutinize specific government spending proposals.

The contractual problems most often addressed in the preparation of the estimates are those relating to cost control. Socio-economic goals may also be given consideration; that is, proposed acquisitions having low priority in relation to other government programs and needs may be cancelled. Government priorities also play an important role in determining the amount and even the nature of certain major acquisitions, such as the Lockheed Orion purchase.

The process begins when Treasury Board notifies all departments that the estimates for the upcoming year should be prepared and submitted. At the departmental level

⁸⁶ An illustration of the amount of time United States committees spend on contractual matters is evident from the fact that the head United States procurement officer estimates that 60% of his time is spent in front of committees. This estimate was made by that official in conversation with a source who has requested that he be listed as confidential.

officials assess their program and operating needs and submit a draft of the estimated expenditures to the deputy minister. The deputy minister then reviews these estimates in consultation with departmental officials. Some items may be reconsidered, others may be cut entirely. From here, the estimates go to the minister, who may insist on further changes. The estimates are then submitted to Treasury Board, where they are closely scrutinized. Further cuts are often made at this point in consultation with the officials of the department concerned. The estimates are then referred to the Board itself. Following this, they are approved by Cabinet and transmitted to the House of Commons.

The second and most relevant function of the estimates is to afford Parliament an opportunity to scrutinize specific government spending proposals. Consideration of the estimates is facilitated by the presence of comparative data. However, this tends to focus discussion on expenditure increases and decreases.

Once Parliament receives the main estimates, they are usually referred at once to the relevant standing committees.⁸⁷ The committees have three months to examine the estimates. They must report back to the House by May 31, at which time the main estimates are deemed to have passed pursuant to Standing Order 58(14). The opposition is then allocated a number of opposition days in which to debate the estimates. The main estimates must be voted on by the

⁸⁷House rules state they must be referred before March 1.

end of June.

In addition to the main estimates, there are supplementary and final supplementary estimates. The supplementary estimates are introduced late in the session. Their purpose is to supplement the main estimates by providing for contingencies which have occurred since the original preparation. They are considered by the standing committees and the opposition is given an opportunity to debate them. The final supplementary estimates are usually introduced just prior to the end of the fiscal year. Their purpose is to provide funding for additional items and for monies spent but not recovered to that point in time. Many public works expenditures that would be suspected of involving patronage and normally "denounced by the opposition in Parliament when the estimates are discussed and passed . . . are commonly placed in the supplementary estimates, where they could be slipped through a weary and ill-attended House in the last few days of the session."⁸⁸ To comment further in this regard:

It is clear that the greater the use which is made of these devices, the less appreciation Parliament can have of the true financial situation when the main estimates are being considered, and this ignorance must inevitably be accompanied by some relinquishing of effective control.⁸⁹

⁸⁸R. MacGregor Dawson, The Government of Canada, 5th edition, revised by Norman Ward (Toronto: University of Toronto Press, 1972), p. 477.

⁸⁹Ibid., p. 361.

One of the primary tasks of the estimates is to allow Parliament to oversee more effectively the operations of the government. It would appear that they have not been very successful in this regard. With reference to government contracting, they do not appear to have contributed much in the way of dealing with contractual problems and advancing the objectives of control.

One of the principle parliamentary control mechanisms over government contracting is the Public Accounts Committee. Its terms of reference enable it to give detailed consideration to procurement expenditures. It is a multi-partisan Committee, whose chairman has been a member of the opposition since 1958. In 1969 the Committee's membership was reduced from 50 to 20, a much more manageable number, and its ability to function was thereby enhanced.

The function of the Committee is to give a detailed consideration to the Public Accounts and the Auditor General's report⁹⁰ and make recommendations thereon to the House. The House receives these reports but does not ordinarily approve or debate them.⁹¹ This fact imposes a limitation on the effectiveness of the Committee as a control mechanism over government contracting. It is also important to note that Parliament through the Public Accounts Committee is restricted

⁹⁰ The consideration of the Auditor General's Report by the Public Accounts Committee is a relatively recent tradition, dating back only as far as World War II.

⁹¹ Government of Canada, Report of the Independent Review Committee on the Office of the Auditor General, Ottawa, March, 1975, p. 72.

into inquiring whether the monies granted by Parliament have been spent in accordance with the votes. The Public Accounts Committee is not empowered to encroach on the functions and authority of the executive. However, the Committee has not interpreted its mandate this conservatively. Rather than being concerned solely with the legality of government activities, the Committee also considers contractual problems involving non-productive payments and inequitable procedures. Examples of such inquiries include the Committee's investigation of financial mismanagement with respect to the refit of the aircraft carrier Bonaventure. A more recent case is the Committee investigation of graft in the sale of nuclear reactors by Atomic Energy of Canada Ltd., a crown-owned company.

It is also the function of the Public Accounts Committee to review the annual report of the Auditor General. In this capacity the Committee becomes involved in a more detailed consideration of government contracting inasmuch as the Auditor General's report usually contains a great deal of reference to such matters. The Committee's attention is thus directed at specific flaws in the spending process. It is a criticism of the Committee that it does not centre its attention on a consideration of procedures that might be adopted to prevent the reoccurrence of such situations, as the British Public Accounts Committee does.⁹² The Committee

⁹²H. R. Balls, "The Public Accounts Committee," in Canadian Public Administration, VI (1963), March, p. 27.

is also plagued by constraints on its members' time, which often cause discussion to be limited to a generalized consideration of expenditures. These constraints on committee members' time are further aggravated by the fact that they have very little in the way of research staff. The committee is assigned only one part-time researcher from the Library of Parliament. Increased specialization and expertise among committee members may help overcome some of these limitations and enable the Public Accounts Committee to be an even more effective instrument with which to deal with contractual problems and advance the objectives of equity and fair value.

The final parliamentary control mechanism that will be considered is the Auditor General. The control over government contracting afforded by this source differs from the other control mechanisms discussed inasmuch as the Auditor General tends to be much more organized and systematic in his consideration of the financial affairs of government. And the Auditor General, in the course of his activities, spends a considerably greater portion of his time examining the contractual affairs of government. The contractual problems most often identified by him relate to questions of cost control, particularly financial mismanagement. Often the only way Parliament and the public are made aware of such procurement problems is through his efforts.

Prior to 1969 the efforts of the Auditor General were supplemented by audits and examinations undertaken prior

to any payment by the Comptroller of the Treasury. It was his job to refuse payment if it:

- 1) was not a lawful charge against an appropriation
- 2) was in excess of an appropriation
- 3) would reduce the balance of funds so as to prevent meeting future commitments.

In 1969 the position of Comptroller of the Treasury was abolished and the responsibility for preaudit transferred to the departments. This deprived the Auditor General of a valuable counterpart capable of dealing effectively with cost control problems.

The Auditor General, as an ex post facto control over the financial affairs of government, provides the government with an opportunity to recover misappropriated funds. However, his main purpose is not to reveal all the faults of government and provide for restitution, but to reveal enough faults to deter those who handle money and accounts from making mistakes and conducting themselves improperly. To this end, Section 61(1) of the Financial Administration Act requires that the Auditor General call attention to every case in which he has observed that:

- (i) any appropriation was exceeded or was applied to a purpose or in a manner not authorized by Parliament,
- (ii) an expenditure that was not authorized or was not properly vouched or certified.⁹³

⁹³"Extracts from the Financial Administration Act," in Government of Canada, Report of the Independent Review Committee of the Office of the Auditor General of Canada, p. 27.

It should be noted that the Auditor General's work is supposed to be limited to revealing and documenting violations of existing regulations; for he is not to intrude or comment upon the functions and responsibilities of the executive. However, Section 61 of the Financial Administration Act provides a catch-all phrase governing those things on which the Auditor General may comment. It reads:

. . . and any other case that he considers should be brought to the notice of the House of Commons.⁹⁴

Acting pursuant to this phrase Auditor General Sellar reported for the first time in 1958 on what he termed "non-productive payments". Since then a tradition has developed whereby the Auditor General has come to inquire into whether value for money has been received, inasmuch as inefficiency and waste become apparent from time to time through the examination of payments. The inquiry into whether value for money was received addresses itself to three questions:

- 1) was the money spent economically?
- 2) was the money spent efficiently?
- 3) was the expenditure effective in meeting its objectives?

These questions are particularly relevant to government contracting insofar as procurement needs tend to be tangible and subject to quantification. The importance of such inquiries to government procurement becomes evident when

⁹⁴ Ibid.

one considers that a great deal of attention is focused on one of the key objectives of control over government contracting, the attainment of fair value.

An example of the effectiveness of the Auditor General in pursuing the objective of fair value may be seen in a case involving the Yukon Aircraft.⁹⁵ The Auditor General requested the file on this aircraft prior to its being phased out of operation. He discovered that, prior to the decision to phase the plane out of service, a problem which constituted a safety hazard had been discovered in the wheels. Replacement parts had been contracted for. By the time the contract had been carried out the aircraft was already being phased out of service. Consequently, the government ended up with more spare wheels than they had use for. The planners had not been able to forecast correctly their requirements. The Auditor General in the hope of discouraging future occurrences of the same or similar situations, talked to those concerned about the problem, but did not comment on it in his report.

The Auditor General has substantial resources which he can apply to the task of obtaining information, but his main problem is in the selection of areas for examination. He and his staff cannot be everywhere at once. His effectiveness as a control mechanism thus hinges on his ability to instill in the bureaucracy an apprehension about where he

⁹⁵ Source confidential, Ottawa, July, 1976.

will strike and which file he will call for. And he seems to have failed to present to the bureaucracy an ever-looming and menacing presence that would keep them on their toes.⁹⁶ His effectiveness also depends very largely on the extent to which the Public Accounts Committee follows up on his reports.

The Auditor General's effectiveness as a control mechanism over government contracting is subject to two further limitations. The first involves an inability to discover certain cases in which contractual authority has been exceeded. In certain departments⁹⁷ it is often the case that individuals acting outside their authority orally commit the government to contracts, which are approved on paper at a later date by superiors at an appropriate level of authority.⁹⁸ The Auditor General is unable to uncover such problems through an examination of departmental records and files. The second limitation upon the effectiveness of the Auditor General is his failure to create an effective liaison with the Treasury Board, whose function it is to manage and coordinate matters of financial administration within the government. Without such a link the government

⁹⁶This point is based on the author's impressions of civil servants' attitudes toward the Auditor General obtained during numerous interviews in which the Auditor General's relation to government contracting was discussed.

⁹⁷This occurs frequently with respect to ship overhaul and repair contracts, as the business is traditionally carried on by word of mouth.

⁹⁸As related by J. Morgan, Marine and Ferry Branch, Department of Transport, Government of Canada, Ottawa, August, 1976.

is handicapped in its effort to develop procedures that would prevent the reoccurrence of a given problem. However, the unprecedented action in 1974 wherein the Treasury Board commented⁹⁹ in detail on the Auditor General's 1973 report is encouraging. If it is continued, a vital link will have been created between two of the most important financial control mechanisms in government.

In summary, parliamentary controls over government contracting, with the exception of the Public Accounts Committee and the Auditor General, do not appear to be very effective with respect to uncovering contractual problems and advancing the objectives of control. The success of even the most effective parliamentary control mechanism seemed to be subject to a good deal of random chance. The problems most often addressed by these control mechanisms were those relating to cost control and the maintenance of fairness and justice in the procurement process. More specifically, the problems most commonly referred to were those involving financial mismanagement and graft. The problem of socio-economic goals which are incompatible with traditional procurement standards was not directly discussed, although socio-economic goals were considered in the context of relating government priorities to procurement needs.

In order to increase the effectiveness of

⁹⁹ Government of Canada, Report of the Independent Review Committee on the Office of the Auditor General of Canada, p. 72.

parliamentary control over government contracting certain steps should be considered:

- 1) opposition days should be used primarily for debate on the estimates rather than on topical motions as is now the case,
- 2) the opposition should be provided with increased staff, and administrative specialization among members should be encouraged in order that the difficulties with respect to obtaining information about government contracting may be overcome,
- 3) committees should be encouraged to develop specialization and expertise within their ranks and make more use of their investigative powers,
- 4) action should be taken to curb the abuses to which the final supplementary estimates are subject,
- 5) the Public Accounts Committee should be provided with research staff to aid it in obtaining information, and it should be encouraged to direct its attention to a consideration of procedures that might be adopted to prevent the reoccurrence of a contractual problem,
- 6) the House should be required to debate and approve the report of the Public Accounts Committee, rather than shelve it as currently appears to be the case, and
- 7) action should be taken to instill in the civil service an increased apprehension as to whether they might be subject to an investigation by the Auditor General.

CHAPTER V

EXECUTIVE CONTROLS

This chapter deals with executive controls over government contracting. Executive controls encompass those control mechanisms of a non-legislative and non-judicial nature which are administered by the Prime Minister and Cabinet. They include a consideration of the roles of the Prime Minister, the Cabinet (including the role of individual Ministers) and the Treasury Board Secretariat. It will be the aim of this chapter to consider the effectiveness of these control mechanisms in terms of their ability to enhance the objectives of control.

The Prime Minister is generally not considered to be an effective control mechanism in the area of government contracting. It is usually the case that issues of a contractual nature, short of developing into an issue of political consequence or a potential scandal, are not deemed important enough to reach his desk or to be considered by his staff. However, the Prime Minister does exercise some control over major contracting matters. For instance, late in 1976 the Prime Minister decided on a PCO task force

recommendation¹⁰⁰ with respect to the division of contracting responsibility between the Post Office and the Department of Supply and Services.¹⁰¹ In so doing, he attempted to introduce a greater degree of co-ordination into the procurement process. It was hoped that such action would contribute to the attainment of better value in government contracting.

Another example of the Prime Minister's efforts in the area of government contracting involves his participation in the Lockheed Orion affair. A dispute had developed in Cabinet between James Richardson, Minister of National Defence and Jean Pierre Goyer, Minister of Supply and Services. The disagreement arose following Lockheed's failure to borrow the necessary money for interim financing of the project. The argument centred on whether or not the government would step in and provide interim financing or let the project collapse. The Prime Minister acted as intermediary in the dispute¹⁰² which was finally resolved by extending the length of the program. The result of this compromise was to reduce the total cost of the contract by 32 million dollars and save \$108 million dollars in interest

¹⁰⁰ As related by B. Vienot, Administrative Services and Purchasing, Post Office, Government of Canada, Ottawa, August, 1976.

¹⁰¹ The exact details of the decision are being kept secret but it appears that the decision favoured the Department of Supply and Services.

¹⁰² Source confidential. Also see - Canada News Facts, May 16-31, 1976, p. 1579.

charges.¹⁰³ The Prime Minister's efforts thus contributed to the government's ability to deal effectively with a cost control problem and thereby advance the objective of best value.

The Cabinet plays a larger and seemingly more important role in the contractual affairs of government than does the Prime Minister alone. Under Section 54 of the British North America Act it is responsible for initiating all financial legislation. And as the body charged with spending government funds, it has a responsibility to try to devise ways and means to restrain and reduce government expenditure. It can do so through a detailed consideration of contract expenditures, particularly those involving a large outlay of government resources, and through its ability to co-ordinate departmental activities and thereby reduce duplication and waste in contractual and other matters.

The Cabinet also exercises control over government contracting by issuing directives on such things as socio-economic goals that it would like to see promoted with the aid of government contracting. For example, the Cabinet has considered the use of government procurement as a viable means with which to solve certain problems in federal penitentiaries. To this end, they have sought ideas on what sort of things prisoners could manufacture. One cannot help but ask whether such a policy would afford the government

¹⁰³Canada News Facts, July 1-31, 1976, p. 1602.

best value for its dollar both in terms of alternate sources of supply for a given product and in terms of future savings in penitentiary-related programs. Such a policy would also run counter to considerations of equity insofar as it would have the effect of excluding, in whole or in part, the suppliers of the good selected for prison production from competition for government contracts in this area.

The Cabinet spends a great deal of time enacting subordinate legislation known as minutes or orders-in-council. Each year several thousand orders-in-council are issued¹⁰⁴ for the purpose of approving supply contracts requiring the approval of the Governor-in-Council.¹⁰⁵ Through its direct approval of various types of contracts, the Cabinet serves as a control over certain matters of government procurement. However, despite a large support staff, the Cabinet finds itself congested with such business and unable to devote sufficient time to more important contractual matters.

The ability of Cabinet to act as an effective control over government contracting is limited in two further respects. First, ministers are subject to constraints on their time. In addition to their Cabinet duties, they serve in Parliament, have constituency responsibilities and are responsible for

¹⁰⁴ Dawson, The Government of Canada, p. 213.

¹⁰⁵ Examples of contracts requiring the approval of the Governor-in-Council include any contract with the National Harbours Board and in the area of revenue contracting, the leasing of a Crown owned vessel to an outside agency.

the administration of their portfolios. And secondly, it is often the case that ministers are poorly informed on many administrative matters. As a result Cabinet directives are at times vague and ineffectual.¹⁰⁶

A measure of control over contractual affairs is also vested in individual ministers. It is their task to run the department for which they are responsible as effectively and as efficiently as possible and to ensure that the goals of equity and best value are maintained in the procurement activities of their department. Consider the following example of how the Minister of Supply and Services upheld the objective of equity in his department's contracting activities.¹⁰⁷ A large electronics manufacturer refused to assume any product performance liability in its contracts with the government. When it came time to discuss the government's insistence that it do so, company representatives refused to speak to anyone short of the minister concerned, with whom they did indeed speak. After consultation with department officials, the minister sustained the government's position that it would not give up its rights at law in the

¹⁰⁶ An illustration of such vagueness is a Cabinet directive on regional development stating that the government should purchase from economically depressed provinces whenever possible in order to bolster their economies. By the term "whenever possible", Cabinet implies that if all things are equal a supplier from an economically depressed region should be selected. All factors are rarely, if ever, equal and consequently the directive does not seem to change existing contracting procedures.

¹⁰⁷ Sources confidential, August, 1976.

event of a law suit on the liability issue. By not making an exception in this case, the minister upheld the objective of equity in the procurement process.

Although individual ministers may at times act as an effective control over government contracting, they often do not have the time to inform themselves on everything that is going on in their departments, particularly with regard to administrative matters. When asked detailed questions in the House or in committees they often rely on departmental personnel to coach them in their answers. And it is often the case that ministers become aware of problems within their departments too late in the game. Such was the case with the Bonaventure and Lockheed contracts. Both developed into full blown political issues. The ability of individual ministers to affect the procedures and substance of contracting within their departments is thus dependent upon their attention being called to a procurement problem. Only after identifying the problem is the minister able to direct attention within his department to the task of preventing the relevant objectives of control from being undermined any further.

A very important executive control over federal government contracting is the Treasury Board Secretariat. The Treasury Board is a Committee of Cabinet composed of the President of the Treasury Board, the Minister of Finance and four other Ministers and their alternates. It has a supporting secretariat, which is considered to be a department

of government, that consists of a deputy head and a number of deputy secretaries in charge of the five organizational branches. The two branches most relevant to government contracting are the program branch, which deals with program expenditures, and the administrative policy branch which deals with guidelines and directives concerning travel and contract policies.

Also of particular importance to contractual matters is the Treasury Board's Interdepartmental Committee on Contracts established in 1950 by the direction of Cabinet pursuant to a Treasury Board recommendation. Its membership consists of senior civil servants from those departments, such as Indian Affairs and Northern Development, Public Works, Supply and Services and National Defence, which undertake a substantial amount of contractual activity. "The terms of reference of the Committee are to review existing procurement and contractual policies, practices and procedures, to report to Cabinet on these policies, practices and procedures and to make such recommendations as seem appropriate in the light of the circumstances found to exist."¹⁰⁸ The Committee has in the past addressed itself to such considerations as the establishment of a centralized procurement agency and the economies inherent therein. It has also concerned itself with the important task of consolidating contracting procedures and introducing some degree of uniformity into them. Among

¹⁰⁸ D. R. McLellan, Canadian Government Procurement (Contracts) (Ottawa: Treasury Board, August 1, 1956), p. X-1.

its major accomplishments is its contribution to the development of a standard construction contract.

The Treasury Board has two important roles with respect to government contracting. It acts as the Cabinet committee on expenditure and as the Cabinet committee on management.¹⁰⁹ In the former capacity it attempts to:

- 1) relate expenditures to government priorities and broad policy objectives,
- 2) assess the effectiveness of various programs in achieving those objectives, and
- 3) assess the efficiency with which these programs are administered.

In assessing government expenditures, the Treasury Board gives a great deal of consideration to how procurement needs, particularly large capital outlays, correspond to government objectives and national goals. A particularly close relationship exists between Treasury Board and the Cabinet Committee on Priorities and Planning.¹¹⁰ Documents are frequently exchanged and the Secretariat usually has representatives present at Cabinet committee meetings.

The function of the Treasury Board as Cabinet committee on management is to establish guidelines and regulations to constrain government expenditure. It does

¹⁰⁹A. W. Johnson, "The Treasury Board of Canada and the Machinery of Government in the 1970s," in Canadian Journal of Political Science, Vol. 4 (1971), No. 3, pp. 346-366.

¹¹⁰Ibid., p. 353.

so by placing constraints on government inputs. These constraints include regulations that determine such things as office space allotments, standards of equipment and procurement requirements. Such constraints act to ensure economy in government contracting. Another form of constraint is designed to ensure honesty in the operation of government. In this regard the Treasury Board develops regulations which act to help ensure public accountability and equitable treatment in government contracting.

Treasury Board control over government contracting also takes the form of policy controls. These are statements of intent by the government in reference to certain aspects of procurement. A good example would be the Treasury Board statement contained at the end of Chapter II, which outlines the objectives of control over government contracting. Another example is the policy of the government not to sell real property.¹¹¹ Only in exceptional circumstances does the government sell its property, even if it is not needed. However, the government will trade land and this is done frequently, especially with the Province of Ontario. In the research, development and natural sciences area the government has what might be termed a buy policy.¹¹² Rather than undertake scientific research itself the government will

¹¹¹ As related by A. Macintyre, Group Chief Contracts Policy, Treasury Board, Government of Canada, Ottawa, July, 1976.

¹¹² Ibid.

contract out to have the work done. Indeed, in this area the government often accepts unsolicited bids for mission-oriented scientific work.

The ability of the Treasury Board to exert control over the financial affairs of government is further supplemented by its role in the budgetary cycle. It has the opportunity to review specific departmental expenditure proposals before they are sent to the appropriate functional committee for consideration. Changes in expenditure proposals result only after consultation with the department concerned. However, as with all activities of the Treasury Board, such changes are subject to correction and further amendment by the government.

The primary method the Treasury Board employs to exercise control over government procurement is the bottleneck technique.¹¹³ On all those contracts requiring Treasury Board approval, the Treasury Board can and does reserve the right to withhold approval if a department does not choose to follow their guidelines and recommendations on contracting procedures. In choosing the bottleneck technique as a control mechanism, the Treasury Board considered two other types of control. One system they considered was a post-audit as occurs in the Province of Ontario. However, they felt that this occurred too late in

¹¹³ The information contained within this paragraph was related by A. Macintyre, Group Chief Contracts Policy, Treasury Board, Government of Canada, Ottawa, July, 1976.

the process. The other system that was considered was that employed in the United States, whereby the federal government maintains a detailed set of contract regulations. The Treasury Board felt that the United States' system would cause too many red tape delays and its rigidity would allow less discretion. Already criticized for being too slow in coming to decisions, the Treasury Board did not want to aggravate this situation further.

The Treasury Board is also able to exercise control over government procurement through its ability to gain access to all departments and agencies in order that it might inquire as to how a department is doing its job. The means that are commonly employed to get this information are task forces, post-audit sampling and detailed studies into specific aspects of a department's operations. Such a detailed study occurred as a result of the dredging scandal.¹¹⁴ The Treasury Board selected a number of people from the major departments concerned and came up with a few minor policy changes which would aid departments in obtaining information from the dredging companies with which they were dealing. They also introduced penalties for the non-disclosure of information. One such penalty would reduce the award of a contract by 10% if incorrect information had been given. Of course, discretion was to be used in applying

¹¹⁴

As related by A. Macintyre, Group Chief Contracts Policy, Treasury Board, Government of Canada, Ottawa, July, 1976.

any such penalties. Having tackled the problem on a short-term basis, Treasury Board then formed an interdepartmental committee to look at all dredging contracts over \$100,000,¹¹⁵ with the aim of developing a long-term policy on dredging contracts and preventing the recurrence of graft.

The Treasury Board Secretariat is an important control over government contracting, but its effectiveness is limited with respect to matters of government procurement by the sheer size of government and by the large number of departments and agencies with which it must deal. Indeed, in October of 1975 the Treasury Board found it necessary to delegate increased contractual approval authority to departments in order to reduce the large number of contracts to which it had to give approval.¹¹⁶ The effectiveness of Treasury Board as a control mechanism is even further complicated by the fact that it reserves unto itself far less approval authority than it delegates. Consequently, it rarely sees contracts that are below a department's contract approval ceiling. Apart from random sampling, the Treasury Board has little control over how contracting authority is exercised.

Treasury Board often finds itself functioning as an ex post facto control. For instance, there is a case in

¹¹⁵ It was assumed that any contract award under \$100,000 would not produce sufficient gains and thereby not provide an incentive to cheat.

¹¹⁶ As related by A. Macintyre, Group Chief Contracts Policy, Treasury Board, Government of Canada, Ottawa, July, 1976.

which a department, due to departmental error, awarded a contract and only later discovered that they had misplaced what turned out to be the low bid. Finding themselves in a mess, they turned to Treasury Board for help.¹¹⁷ Another example of the ineffectiveness of Treasury Board as a control over government contracting is the way in which it handled the Lockheed Orion affair. The original deal fell apart when the government reversed itself and decided it would not provide the cash Lockheed had failed to borrow from Canadian chartered banks. Ideally, Treasury Board should have been able to discover earlier in the process that there were no monies appropriated to finance initial work on the project. This could have prevented a case of financial mismanagement resulting in the government being liable for 16 million dollars already spent on special studies.¹¹⁸ These examples help illustrate the often ad hoc basis of Treasury Board control and the need for more consistency in its operations, if it is to be more effective in developing procedures that will promote the attainment of equity, fair value and national goals in and by means of the procurement process.

In summary, executive controls over government contracting address the entire range of contractual problems, but vary in their ability to advance the

¹¹⁷ Ibid.

¹¹⁸ The 16 million dollars was subsequently saved by the signing of a new contract on July 21, 1976.

objectives of control. The Prime Minister tends to become involved in contractual matters only when they are issues which involve scandal or are of political consequence. In the latter case, he is sometimes called upon to mediate departmental disputes involving questions of cost control and financial mismanagement.

The contractual problems most often addressed by Cabinet relate to cost control. These are usually examined in the context of reducing departmental expenditures, as work load and time constraints tend to prevent a more comprehensive examination of contractual problems. It should also be noted that Cabinet sometimes interferes with the objectives of equity and best value by introducing socio-economic goals which may not be consistent with the procurement function of government. However, these socio-economic directives are at times too vague to change existing contractual policies and practices.

The control over government contracting exercised by individual ministers tends to centre on the objectives of equity and best value. More specifically, they tend to concentrate on questions concerning cost control and the fairness of contractual procedures. Ministers do not usually have the time to consider administrative matters and are often unaware of contractual problems within their departments, as is evidenced by the Lockheed and Bonaventure affairs.

The Treasury Board Secretariat deals with a wide range of contractual problems, including cost control,

financial mismanagement, graft and the maintenance of equitable administrative practices and procedures. It also relates procurement needs to government priorities and socio-economic goals. In this context, socio-economic goals tend to be consistent with the procurement function of government. The effectiveness of Treasury Board as a control over government contracting is limited by the ad hoc manner in which control is exercised. The only systematic basis of control is provided by the bottleneck technique, which is subject to a number of limitations. The other control devices, task forces, post-audit sampling and detailed studies, often occur too late in the process and serve only as ex post facto controls.

The following recommendations might be considered as means by which the effectiveness of executive control over government contracting might be increased:

- 1) The authority to approve supply contracts presently requiring the approval of the Governor-in-Council should be transferred to the Treasury Board Secretariat. It seems unlikely that Cabinet gives any detailed consideration to such contracts and their pro forma consideration would appear to be a waste of Cabinet's time.
- 2) Treasury Board should develop more comprehensive and systematic means by which to review government contracting procedures and practices. It should attempt to identify problems early on in the procurement process and introduce corrective procedures. In this regard, it might be

beneficial if the Treasury Board Secretariat developed a closer liaison with the Office of the Auditor General.

CHAPTER VI

ADMINISTRATIVE CONTROLS

This chapter considers administrative forms of control. This entails an examination of some of the major government departments involved in the procurement field and the techniques that they employ to exercise control over government contracting. These techniques include:

- 1) the centralization of the government procurement function in common service departments;
- 2) the determination of levels of contractual authority; and
- 3) the use of the contractual document as a means by which to protect government interests.

It is the purpose of this chapter to assess these techniques in terms of their ability to deal with contractual problems and thereby advance certain objectives of control.

Within the last decade, the government procurement function has become increasingly centralized. This is evidenced by the increased role common service departments play in administering government procurement activities. Unlike other departments, who concern themselves primarily with 'getting things done', common service departments have a control function as their primary concern.

The effectiveness of common service departments in exercising control over government procurement activities is largely dependent on the development of contractual expertise. Such expertise evolves from specialization and is often supplemented by policy review groups, whose function it is to monitor and evaluate contractual practices and procedures and deal with such procurement problems as become apparent from time to time. Expertise in government contracting develops slowly and is often adversely affected by government reorganizations, which shuffle experienced manpower away from the procurement field. The Department of Public Works has been hit particularly hard in this respect. Continual reorganizations and an abnormally high turnover rate have left the contracting branch of that department with a perpetual shortage of experienced personnel.¹¹⁹

The ability of common service departments to deal with contractual problems is limited in many respects. For instance, the Minister of Supply and Services has the responsibility for ensuring that the objectives of best value and equity are met in goods procurement. But how does he know whether the government is receiving best value for its money, when he doesn't use the goods that he supplies? And how can he guarantee equity in goods procurement when suppliers are often pre-determined by way of single source

¹¹⁹As related by S. Ings, Contract Policy and Administration, Department of Public Works, Government of Canada, Ottawa, July, 1976.

requisitions?

The sort of problems that common service departments tend to focus on are those involving cost control and the maintenance of equitable procedures and practices. To this end, they contribute toward the attainment of the primary objectives of control, equity and best value. However, departments are not always obligated to make use of common service departments. In the case of the Department of Public Works, departments are encouraged but not forced (depending on their level of contractual authority) to avail themselves of that department's construction talents.

Administrative control over government contracting can also be seen in terms of levels of authority. In this context, administrative control addresses the problem of cost control and thereby helps advance a key objective of control, the attainment of best value.

Authority levels vary depending on the nature of the acquisition and the department concerned. Table 10 gives a breakdown of authority by department for construction, goods, non-consulting and consulting service contracts. Any amount in excess of the figures presented in Table 10 must first be approved by Treasury Board.

One will note that the contractual authority of common service departments is relatively high in comparison to other departments. To the extent that other departments exceed their authority they must make use of the services of such bodies as the Department of Supply and Services and the Department of Public Works. It is in this way that common

TABLE 10¹²⁰

Contractual Authority Levels of Departments

Type of Contract	Contracting Agency	Maximum non-competitive authority (without Treasury Board approval)	Maximum competitive authority (without Treasury Board approval)
Construction	DPW	\$100,000	\$2,500,000 ^a
	DCL	\$100,000	\$1,250,000 ^a
	IAND	\$100,000	\$ 250,000 ^a
	other depts.	\$ 15,000	\$ 100,000 ^a
Goods	DSS	\$500,000	\$1,000,000 ^a
	other depts.	\$ 15,000	\$ 50,000 ^a
Non-consulting services	DSS	\$500,000	\$1,000,000 ^b
	MOT	\$ 50,000	\$ 250,000 ^b
	DPW	\$ 50,000	\$ 200,000 ^b
	other depts.	\$ 25,000	\$ 50,000 ^b
Consulting services	DSS	\$ 35,000	\$ 70,000 ^c
	Other depts.	\$ 25,000	\$ 50,000 ^c

DSS - Department of Supply and Services

DPW - Department of Public Works

DCL - Defence Construction (1951) Ltd.

MOT - Ministry of Transport

IAND - Department of Indian Affairs and Northern Development

^aTwo or more valid tenders must be received, they must be firm price contracts, the lowest must be accepted.

^bTwo or more valid tenders must be received and the lowest accepted - it need not be a firm price contract.

^cAt least three proposals must be considered.

¹²⁰This table was constructed from information contained in: Government of Canada, Government Contract Regulations, Financial Administration Act, P.C. 1975 - 2042, August 27, 1975.

service departments exercise a degree of control over government contracting.

The government actively encourages the use of common service departments, as is evidenced by the following Treasury Board statement:

In those areas, where the interests of overall economy and efficiency in government can best be met by the centralized acquisition of goods and services or the centralized carrying out of construction and leasing, it is the policy of the Government of Canada to direct procurement through a common service agency. For such centralization to be effective, close cooperation is required between the common service agency and its client departments.¹²¹

With respect to goods procurement, there exist three conditions under which departments are encouraged to contract directly. The first is if a purchase is less than \$100. The Department of Supply and Services doesn't want to be bothered with such small amounts. The second condition is if an emergency exists. And the final condition is if the goods are of a unique character such as those used in some types of scientific research. The Post Office has chosen to give wide interpretation to the word unique so as to meet its specialized needs. Consequently, the Department of Supply and Services and the Post Office have been at odds with each other since the creation of the Department of Supply and

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Government of Canada, Treasury Board, Administrative Policy Branch, Policy and Guidelines on Contracting in the Government of Canada, Ottawa, June, 1975, p. 7.

Services in 1969.¹²² The delegation of contracting authority in goods procurement can also be achieved by means of a national master standing offer that departments can call up against.¹²³

A minister exercises the ultimate contracting authority within his department but may choose to delegate it to his subordinates. A Department of Supply and Services reference manual defines contract approval authority for that department in the following way:

Contract approval authority is the authority delegated by the Minister to the incumbent of a position to approve submissions to enter into contracts, contract amendments or standing offers up to specified dollar limits subject to applicable legislation, regulations, (conditions, policies and guidelines) in effect at such time.¹²⁴

At the lower tiers in the administrative hierarchy there exists very little in the way of discretionary authority. More is needed. A case in point is a situation where a large government survey crew had to stop work and

¹²²As related by B. Vienot, Director, Administrative Services and Purchasing Branch, Post Office, Government of Canada, Ottawa, August, 1976.

¹²³A national master standing offer is where, for example, the Department of Supply and Services contracts for typewriters and the departments can purchase the number they need during the term of the contract by simply calling up the supplier and ordering them. A call-up against a standing offer constitutes a contract.

¹²⁴Confidential and unpublished material, Department of Supply and Services, August 1976.

wait for approval for a chainsaw requisition in order to cut down a tree which was impeding their progress.¹²⁵ One need only ask if the wasted man hours were worth the red tape encountered in acquiring the chainsaw. The reluctance of civil servants to challenge the government with respect to the need for increased discretionary authority appears to stem from fear of engaging in what might be called 'career limiting actions'.¹²⁶

A public servant may start with high expectations of getting things done. However, after a number of his ideas are rejected, he becomes more realistic and acutely aware of how the bureaucracy functions.

He is able to reduce his failure rate: he reduces the number of his ideas which are shot down by reducing the number proposed. So "improvement" is accomplished by reducing the number of things he tries to do - by reducing the amount of change he seeks to bring about.¹²⁷

Graphically the process of becoming an experienced bureaucrat could look as follows:

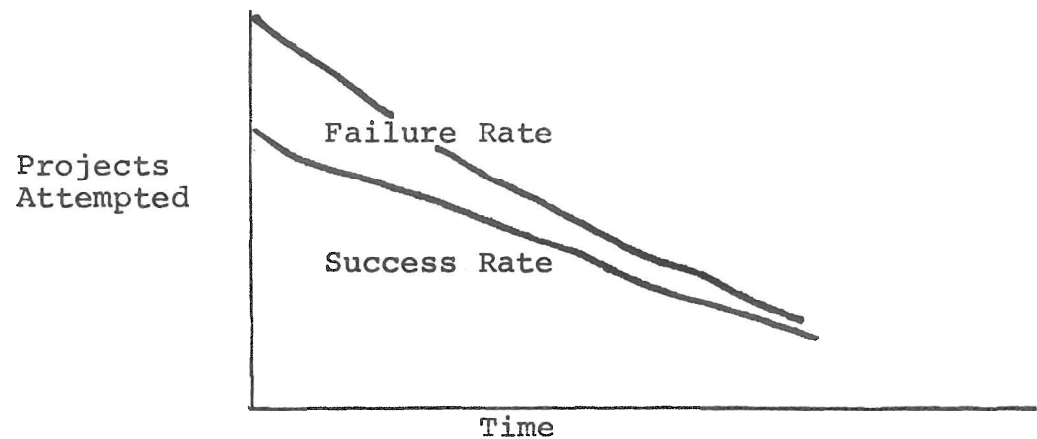
¹²⁵ Source confidential, Ottawa, August, 1976.

¹²⁶ This notion represents the author's impressions following numerous interviews with public servants.

¹²⁷ R. Fisher, International Conflict for Beginners (New York: Harper & Row, 1969), p. 186.

FIGURE 3¹²⁸

Becoming an Experienced Bureaucrat



One of the most effective administrative forms of control over government contracting is the contractual document. The reason for this seems to be that federal priorities are on entering into a contract as opposed to administering it. The nature, terms and conditions of a contract usually emphasize the objective of best value. They do so by addressing the problem of cost control. In this regard, the contractual document acts to protect the Crown's interests. However, it is quite another thing to follow through and ensure that contractual arrangements have been lived up to.

As Table 11 illustrates, there are numerous types of contracts the government can enter into:

¹²⁸ Ibid.

TABLE 11
Types of Contracts

Firm Price	a) competitive b) negotiated
Cost Reimbursable	a) cost plus a fixed fee b) cost plus a fixed fee with a swing feature
Target Price	
Lease Purchase	
Revenue	

There are two kinds of firm price contract; competitive and negotiated. A contract may be described as competitive when two or more valid tenders from different sources have been received and where it is assumed that competition has held cost and profit to reasonable levels. Whenever possible, the reasonableness of the price in a negotiated (single source)¹²⁹ contract must be supported by a cost and profit breakdown. The firm price type of contract may also serve as the basis of a national master standing offer. This is a contractual agreement between

¹²⁹ Thirty-five percent of supply contracts in the Department of Supply and Services are single source requisitions. Sixty percent of the Department of Supply and Services' contracts are thought to be non-competitive. These estimates are thought to be conservative. Source confidential, Ottawa, August, 1976.

Joe Priddle of the Contracts Settlement Board of the Department of Supply and Services estimates that 90% of his department's contracts are negotiated, when considered on a value basis.

the Department of Supply and Services and a company whereby a government department or agency is free to requisition directly from the company at a predetermined price the goods covered in the agreement. A call up against such an offer would constitute a contract.

There are also two forms of cost reimbursable contract. The first is cost plus a fixed fee, which is usually determined by negotiation on a range basis. This means that a certain range of percentages, estimated on the basis of the value of the contract, are considered in the negotiations to fix a fee. The cost plus fixed fee contract with a swing feature is the type of contract that applies to unknown circumstances. For example, a Crown ship may have to undergo repairs and the exact extent of damages or the nature of the problem are not known. Consequently, an estimate is made and a fixed fee attached to it. If the repair is larger than anticipated, the two parties will sit down and renegotiate the contract. Similarly, if the problem is not as great as anticipated a refund might be negotiated.

Target price contracts include three components: a fixed fee, an incentive and a ceiling. The incentive is applicable when the contract falls below its estimated target cost. The incentive may stand on its own or may have a penalty associated with it. This allows the government to transfer risk to the contractor. An incentive is usually arrived at by gut feeling during the negotiations. It is a question of how much the government contracting officer can

get away with. One might provide an incentive of 20 cents for each dollar saved under the amount of the target price. Similarly, the government in its desire to transfer risk to the other party may pay only 80 cents toward every dollar of cost between the target cost and the ceiling. The contractor would have to absorb the 20 cents penalty. Performance and delivery incentives may also be included in such contracts.

The lease purchase agreement was developed as a matter of expediency and as a result of capital expenditure restrictions. The purpose of a lease purchase contract is to avoid tying up a lot of capital. It permits payments to be spread out over a number of years after which time the government owns the building. It allows the government to get more people into Crown owned buildings by enabling the government to build a larger number of buildings in a shorter period of time. The economics of this type of contract means that the government pays more in the long run than if it had purchased the building outright. However, the extra payments must be considered in terms of opportunity cost. The government has to lease buildings regardless. Lease purchase offers the added incentive of being able to buy the building. An example of such an agreement is the Terrasses de la Chaudière complex in Hull.¹³⁰ The government

¹³⁰ Maurice Cutler, "Ottawa's Projects: Federal spending called 'largest realty operation'," in Financial Post, May 15, 1976, p. S5.

will lease three office towers (1.8 million square feet), for approximately 14 million dollars a year over a 35 year period. This amounts to a cost of \$480 million over the life of the contract with an option to buy the complex at the end of the lease for \$54 million. This compares to a construction cost of \$164 million as estimated by the contractor. As mentioned in Chapter V, the cost of this agreement is cause for concern.

Revenue contracting includes both the sale of goods, which is the responsibility of Crown Assets Disposal Corporation, and the sale of services. The sale of services, in the form of leases and concessions, is a major revenue area. The Department of Public Works is constantly under pressure to lease commercial space in its office buildings. The same is true of the Ministry of Transport with regard to airport concessions. This latter area has recently been the subject of some controversy in the Skyshops affair.

Government contracts include many special features. Most notably they tend to include fixed time and unit price rates as a breakdown of cost. This provides the government with a basis on which to negotiate and control cost increases associated with change orders and additional work. Another feature of a government contract is that it is always a contract for work, not people. This allows the government to avoid entering into an employer-employee relationship and the perils, such as the cost of strikes, associated with it.

Various conditions are also applied to government

contracts. Frequently the text of a contract makes reference to its being subject to certain acts of Parliament. For example, defence contracts make reference to the fact that they are subject to the Defence Production Act. And Section 19 of that Act states:

(1) A person who has entered into a defence contract shall keep detailed accounts and records of the cost of carrying out the contract and shall, on demand, produce to any person thereunto authorized by the Minister every account, record or document of any description with respect to the contract and with respect to his other business that may be required by the person so authorized and shall permit him to examine, audit and take copies of and abstracts from the accounts, records and documents.

(2) Where the Minister is satisfied, either before or after the performance, in whole or in part, of a defence contract entered into after the 1st day of April 1951, that the total amount paid or payable thereunder to any person is in excess of the fair and reasonable cost of performing the contract together with a fair and reasonable profit, he may by order reduce the amount that such person is entitled to retain or receive thereunder to such amount as he may fix as the fair and reasonable cost of performing the contract together with a fair and reasonable profit thereon and the Minister may direct that person to pay to the Receiver General forthwith any amount that such person has received under the contract in excess of the amount so fixed.¹³¹

¹³¹ Office consolidation, Defence Production Act, R.S., c.62, S.I.

The provision of such a discretionary audit is not as effective a method of control as might be imagined. The cost of such an audit is about \$2,000. Hence, only larger contracts tend to be audited. And when such audits have been undertaken, they have usually resulted in added awards to the contractor.¹³²

Negotiated contracts usually contain a provision stipulating a maximum profit ceiling to which the contractor is subject.¹³³ The Department of Supply and Services usually allows 10 to 11% on negotiated fixed fee contracts and 3 to 6% on the less desirable cost plus fixed fee contracts. On those occasions when the profit ceiling has been exceeded by a few percentage points, say 15 instead of 11%, the department usually tends to look the other way.¹³⁴ However, the department can ask for a negotiated refund of excess profit, that is profit which is in excess of that which is fair and reasonable or that which is stipulated in the contract.

One of the biggest problems in contractual arrangements is cost escalation. In order to provide itself with maximum protection the government has, whenever possible, tended toward firm price contracts. However, this is not

¹³² Source confidential, Ottawa, August, 1976.

¹³³ In competitive contracts, competition is generally thought to keep profit to a reasonable level.

¹³⁴ Source confidential, Ottawa, March, 1977.

always possible. Consequently, the government has introduced certain contracting practices that afford the Crown increased protection. For instance, the Department of Supply and Services operates on the premise that escalation clauses should not be considered if the delivery period of a contract is less than six months. Furthermore, the department has defined three standards when dealing with escalation:

1) escalation clauses should not give a one-sided advantage.

Therefore if costs go down the government should benefit.

2) escalation clauses should have a ceiling.

3) escalation clauses lower contractors' risks and thus a

lower profit level and associated price would be appropriate.

Thus, the government position allows the contractor to apply escalation clauses only to those price elements where available information is inadequate to predict the amount of escalation.¹³⁵

Construction contracts seem to produce relatively few problems of a contractual nature and seem to afford a maximum of protection to the Crown. Since 1963 there has existed a standard federal construction contract which has been continually refined over the years. All the departments engaging in major construction activity, such as the Department of Transport, the Department of Indian Affairs and Northern Development and Defence Construction (1951)

¹³⁵

The government has made provision in firm and ceiling price contracts for price adjustments in the event of changes in federal taxes after the date of the contract.

Ltd., use it. Its effectiveness may be illustrated by example. On all tenders the Department of Public Works asks the contractor to list all non-Canadian items. The department also asks what the price difference would be to replace foreign bought materials with comparable Canadian items. A contractor on the West Coast failed to indicate in his contract that he would be using Japanese steel in his construction project. The Department of Public Works held him accountable for his mistake despite the financial hardship he would be forced to face.¹³⁶

Thus, the provisions of a contract can provide the government with a good deal of cost control. However, this is not always the case. For instance, in 1976 the Canadian government entered into a contract with a West German company for the purchase of Leopard tanks. A Canadian government statement concerning the agreement reads:

The recent purchase of Leopard tanks has resulted in a contractual commitment on the part of Krauss-Maffei Aktiengesellschaft (KM) . . . to purchase \$60 million worth of Canadian goods during the next 10 years. The products are to be fully manufactured items of high technology and of high Canadian content. The product range is not dependent on Krauss-Maffei's own manufacturing interests but the agreement allows

¹³⁶

As related by Mr. J. C. Morin, Contract Policy and Administration, Department of Public Works, Government of Canada, Ottawa, July, 1976.

Krauss-Maffei to influence any German company to purchase on their behalf.¹³⁷

The important point to note concerning the agreement is that it does not guarantee \$60 million worth of new business opportunities for Canadian manufacturers. Under the terms of the contract, Krauss-Maffei can influence any German company to purchase on its behalf, even if that company would normally have planned to purchase goods in Canada. The net effect of the contract, in contrast to its objectives, may be to decrease intended sales of Canadian manufactured goods abroad.

In summary, administrative controls over government contracting tend to focus on the problems of equity and best value. Equity, expressed in terms of fair administrative practices and procedures, is attained by the centralization of the procurement function in common service departments. The existence of policy review groups and the development of expertise within such departments contribute to their ability to advance the objective of equity, as well as deal with the important problem of cost control. The effectiveness of these departments is limited in several respects. In goods procurement, the Department of Supply and Services has no control over needs definition and single source requisitions. And in construction contracting, departments are not obligated

¹³⁷ Supply and Services Canada, Weekly Bulletin of Business Opportunities, Vol. 3 (1976), No. 47, attached supplement re: Leopard Tanks Purchase.

to use the services of the Department of Public Works, unless their project exceeds their level of contractual authority.

The major focus of administrative control is directed at the problem of cost control. This problem is addressed by defining levels of authority with respect to cost approval and by introducing cost control features within the contractual document. The effectiveness of levels of authority as a cost control mechanism is hindered by a lack of discretionary authority and by a general reluctance on the part of many civil servants to challenge the government on this point. The contractual document, on the other hand, tends to be a relatively effective cost control mechanism. The nature, terms and conditions of a contract contribute to cost reduction by such means as keeping profits to reasonable levels and transferring risks to the contractor. Another method of cost control are cost breakdowns, which provide the government with a basis on which to price additional work. A major drawback with regard to the effectiveness of the contractual document as a cost control mechanism is the existence of the lease purchase type of agreement. Although expedient, such agreements tend to commit the government to expenditures far into the future, and may often not be justified in terms of opportunity costs.

The problem of socio-economic goals which are incompatible with traditional procurement standards was also considered in the context of promoting Canadian content in goods and construction procurement. In this regard, it

was noted that the control mechanisms concerned contributed to rather than helped alleviate the problem.

Consideration should be given to the following recommendations as means by which the effectiveness of administrative control over government contracting could be increased:

- 1) the impact of government reorganizations on key procurement personnel should be assessed in order to avoid a serious drain on experienced manpower, as occurred in the Department of Public Works;
- 2) the Department of Supply and Services should require justifications for all single source requisitions made by customer departments;
- 3) the exercise of discretionary authority should be encouraged in those situations where its use is warranted; and
- 4) the utility of the lease purchase agreement should be re-evaluated in terms of its cost effectiveness in meeting government needs.

CHAPTER VII

LEGAL AND JUDICIAL FORMS OF CONTROL

This chapter examines the legal parameters within which government contracting takes place. This includes a consideration of two control mechanisms, statutory law and the courts. The former will be considered in terms of the sort of contractual problems it is designed to prevent, the latter in terms of the problems with which it deals.

Perhaps the most penetrating and all encompassing control over government contracting is that of statutory law. Its importance stems from the fact that the public servant can only do that which is authorized by law, as opposed to doing all except what is prohibited by law. This distinction and the existence of provisions within a contract making it subject to certain Acts of Parliament are the central elements necessary to an understanding of its importance in dealing with such contractual problems as cost control, financial mismanagement, graft and the maintenance of equitable administrative practices and procedures. In this regard, statutory law can be seen as both a guide and as a deterrent.

An important statute addressing the problem of cost control is the Defence Production Act (1951). Section 19 of the Act allows the government to audit a defence contractor.

A departmental document interpreting this section of the Act states:

Section 19 requires a defence contractor to keep proper accounts and cost records, and to make them available to the Minister or his delegate. Subsections 2 to 5 empower the Minister to reassess contract costs and profits when he thinks them unreasonably high, and to reduce contract costs and profits. If the contractor's records seem unsatisfactory the Minister is not bound by them.¹³⁸

At first glance Section 19 seems to offer itself as a valuable means with which to control costs in defence contracting. However, it is often difficult to enforce with respect to foreign defence suppliers as they are not subject to Canadian laws.

The most noteworthy statute governing contractual affairs is the Financial Administration Act. Section 27 of this Act deals with financial management in contractual affairs. It states that no payment shall be made by the government without certificate from the department that:

- a) work has been performed, the goods supplied or the service rendered, as the case may be, and that the price charged is according to the contract, or if not specified by the contract is reasonable; or
- b) where payment is to be made before the completion of the work, delivery of the goods or rendering of the service, as the case may be, that

¹³⁸ Confidential and unpublished material. Also see the Act.

the payment is in accordance
with the contract.¹³⁹

Section 33 of the Financial Administration Act places the government under further limitations with regard to the financial management of government procurement. This section states that:

it is a term of every contract providing for the payment of any money by Her Majesty that payment thereunder is subject to there being an appropriation for the particular service for the fiscal year in which any commitment thereunder would come in the course of payment.¹⁴⁰

Contracts must thus conform to the budgetary restrictions to which they are subject.

The limitations placed on financial management in government contracting provide a broad basis for control. However, this is not to say that the provisions of statutory law are not violated. The Lockheed Orion deal serves to illustrate this point. The Department of National Defence had initially committed itself to payments under contract for which there was no appropriation. Rather than being seen as a violation requiring disciplinary action, the Lockheed deal was treated by the press and the opposition parties as just another government blunder. Although ministers and civil servants alike were to blame for the

¹³⁹ Government of Canada, Revised Statutes of Canada, 1970, c. F-10, S-27.

¹⁴⁰ Ibid., S. 33.

Lockheed situation, it was the government ministers who had to take the flack. And in the interest of political survival, they found it necessary to make the claim of no wrong doing on their part.

Other contractual problems addressed by statutory law are graft and the maintenance of equitable administrative practices and procedures. Section 92 of the Financial Administration Act and sections of the Criminal Code of Canada have provisions relating to the breach of laws or regulations in the area of government contracting. The contractual regulations referred to involve such things as conflicts of interest and are designed to help maintain equitable contractual practices and procedures. Of course, in order to apply these laws and regulations, one must first be able to establish that an offence has taken place. This is no easy matter, for laws will remain ineffective unless charges are laid. And who is to lay the charges? A civil servant may not want to jeopardize his position and hopes for promotion by revealing breaches of law within the branch of government for which he is responsible. Government leaders also find it in their interests to avoid scandal.

Statutory law is thus a major determinant of the procedures and substance of government contracting. It is a valuable guide with respect to matters of cost control and financial management. It also provides a deterrent against graft by providing for punishment of criminal activity in the contractual affairs of government. In the latter instance,

its effectiveness as a control over government contracting tends to be limited, inasmuch as enforcement seems to be lacking.

Statutory law is a preventive control. It provides a guide or restraint with regard to improper contractual activity. The courts, on the other hand, exercise a reactive as opposed to a preventive control. More specifically, they are responsible for the adjudication of claims in the area of administrative law. In this capacity, they provide judgements on already existing contractual problems.¹⁴¹ The problems most commonly considered by the courts are those of cost recovery, financial mismanagement, graft and the maintenance of equitable practices and procedures. The last problem is most often examined in reference to contract interpretation and appeals against subordinate legislation.

Judicial decisions concerning government contracting tend to centre around three factors. These are the contractual document, the conduct of those involved with it and the authority underlying it.

The provisions of a contract appear to be the element most often under judicial review. Indeed, only in a court of law do the provisions of a contractual agreement become enforceable. The government or a contractor may file a claim for redress of grievances against the offending party

¹⁴¹It should be noted that the courts also have a deterrent effect. It appears to be minimal but this is difficult to determine.

of a contract. This may entail the demand for compensation or the imposition of a penalty on a party who has not properly fulfilled the provisions of the contract in the ways outlined by the contract. An example¹⁴² of such a case is the claim by Her Majesty against Hawker Siddeley Canada Ltd. and Chemi-Solv Ltd. filed on August 20, 1975. The claim came about as a result of corrosive damages sustained during the chemical cleaning of the port and starboard main boilers of H.M.C.S. Restigouche. The government's claim for damages, which included the cost of investigation, repair of corrosion damage and loss of the use of the vessel totalled \$721,468.26. The Deputy Attorney General of Canada, acting for the plaintiff, also sought to recover the costs of the court action and any other relief deemed just by the court.

The courts, by providing compensation and aiding in the recovery of costs, help the government ensure that the objective of obtaining fair value for the taxpayer's dollar is met. However, it should be noted that the process works both ways. Contractors can also sue the government and its agents. And insofar as they are successful in such suits, the attainment of the objective of best value is compromised.

The courts also play an important role with regard to the interpretation of the provisions of a contract. This

¹⁴²The example is based upon a statement of claim and supporting documents filed on Aug. 20/75 between Her Majesty the Queen in the Right of Canada (Plaintiff) and Hawker Siddeley Canada Ltd. and Chemi-Solv Ltd. in the Federal Court of Canada (Trial Division).

is to say that the courts decide whether the provisions of a contract have been lived up to when any ambiguity exists with respect to its interpretation. A good illustration of such a situation is cited in the United States Contract Appeal Decisions:

A dam construction contractor was entitled to additional compensation for bringing sand to the worksite from downstream because the government's refusal to allow him to take sand from the area designated in the contract unless he backfilled and restored it to its original conditions was not economically feasible and constituted a change. The contract required only that the borrow area be "restored to a condition after completion of construction that will appear natural and not detract from the appearance of the project." The contractor's plan to make the borrow area into a lake was in accordance with this instruction; the government's interpretation of "restore" to require restoration to its original condition was a change.¹⁴³

By favouring the contractor, this decision implied government mismanagement inasmuch as the government did not get what it wanted. It should also be noted that the imposition of unreasonable demands upon a contractor as a result of provisions within a contract, constitute grounds for challenging the validity of that contract.¹⁴⁴

¹⁴³ Board of Contract Appeals Decisions (New York: Commerce Clearing House, 1976), pp. 56,901-56,902.

¹⁴⁴ E. A. Driedger, "Subordinate Legislation," in A. M. Willms and W. D. K. Kernaghan, Public Administration in Canada: Selected Readings, 1st Edition (Toronto: Methuen, 1968), pp. 416-417.

The second category of judicial decisions to be discussed are those relating to the conduct of government contracting. These decisions tend to deal with the problem of graft and are concerned with the maintenance of equity in the procurement process. For instance, the government's conduct with respect to contracting is subject to its exercising good faith in carrying out its statutory powers.¹⁴⁵ These powers must be used in accordance with the purposes for which they are given. "A court of law may intervene if powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorized or actually forbidden."¹⁴⁶ The authority of the courts extends to the prosecution of any criminal conduct undertaken by the government and its agents and/or the contractor. Provisions relating to such conduct are contained in the Criminal Code of Canada, to which reference was made in earlier chapters.

The third and final category of judicial decisions to be discussed are those in which contractual authority is challenged. A government contract may be challenged on grounds that the authority conferred by an Act has been

¹⁴⁵ It is interesting to note that the government sometimes has a decided advantage in a court of law. Where Parliament has given a Minister discretionary power the courts cannot interfere with the exercise of that discretion. This advantage can serve to place the government in a better position than the contractor or supplier in the event of a legal dispute.

¹⁴⁶ Driedger, "Subordinate Legislation," p. 416.

exceeded or the Act itself is ultra vires with respect to the British North America Act. Included in most government contracts is a provision allowing the Governor-in-Council to make regulations with respect to that contract. It reads to the effect that:

The Governor-in-Council may make regulations as he deems necessary for carrying out the purpose and provisions of a given Act.

Subordinate legislation enacted in the form of regulations is considered to constitute law. It can be challenged on several grounds.¹⁴⁷ These include:

- 1) the repeal of the authorizing act;
- 2) the authorizing act being found ultra vires;
- 3) the improper delegation of contractual authority; and
- 4) the failure to comply with necessary conditions established in the authorizing statute.¹⁴⁸

When considering appeals against subordinate legislation, the courts frequently consider the problem of maintaining equitable administrative practices and procedures. In this regard, they can remedy a specific situation, while indicating to the government that a problem exists. The government is then free to take any corrective action it deems necessary to avert a repetition of such a situation

¹⁴⁷ It would appear that such subordinate legislation is seldom challenged. This assertion is based on a review of Dominion Law Reports for the period 1969 to 1976.

¹⁴⁸ Driedger, "Subordinate Legislation," pp. 411-427.

in the future.

The courts are a meaningful control over government contracting, but their effectiveness is subject to some limitation. This is to say that the judicial process works both ways and legal claims are often made against the government.¹⁴⁹ Another limitation relates to the difficulties in uncovering, let alone prosecuting, contractual activities involving graft. It should also be noted that not all contractual problems are amenable to legal adjudication.¹⁵⁰ In this regard, judicial review should be seen as only one of many mechanisms by which control can be exercised over the contractual affairs of government.

¹⁴⁹ An example of a claim against the government held for the plaintiff is *The Queen v. Transworld Shipping Ltd.* This case involved the Department of Transport's repudiation of a contract governing the charter of a vessel. The tender originally called for a 'commonwealth flag' vessel. The firm in question complied with this condition. The Crown later amended the requirements so as to allow only 'Canadian flag' vessels. *Transworld Shipping Ltd.* was subsequently awarded \$110,124.24 in the Federal Court (Trial Division) and this judgement was upheld in the Federal Court of Appeals. See - *The Queen v. Transworld Shipping Ltd.*, Federal Court of Appeals, June 30, 1975, 61 D.L.R. (3d), 1976, pp. 304-316.

¹⁵⁰ Contractual problems are sometimes settled out of court by agreement of the parties concerned. An example of such a case is the claim of *Northrop Corp.* that Her Majesty failed to abide by a license agreement governing the *Northrop F-5A* and *B* aircraft. The sale of these aircraft to Venezuela in December, 1973 constituted a breach of the agreement. *Northrop* accepted the Crown's offer of compensation. The case had an unusual twist in that both parties went to court seeking a judgement on the agreement, so that they need not wait for Parliament to appropriate the monies. The case was dismissed in the end. See - *Northrop Corp. v. The Queen et al.*, Federal Court (Trial Division), July 14, 1976, 68 D.L.R. (3d), 1976, pp. 182-187.

To conclude: both statutory law and judicial review help advance the objectives of equity and best value. However, their emphasis differs. Statutory law is a preventive control. Judicial review deals with already existing contractual problems, and in this capacity acts as a reactive control. The former is designed to act as a guide in matters of cost control and financial management. The latter applies remedies to the problems of cost recovery and financial mismanagement. In this regard, it should be noted that the government is not always the claimant.

Statutory law also acts as a deterrent with respect to avoiding graft. Judicial review, on the other hand, exacts punishment for such activity. Both deal with the problem of maintaining equitable contractual practices and procedures. The former does so by defining such things as conflicts of interest, and the latter by dealing with contractual interpretation and appeals against subordinate legislation.

The effectiveness of judicial review as a control over government contracting is largely dependent on how often the government or its contractors bring cases to court. As an enforcement agency, the courts depend on others to uncover contractual problems and initiate legal action. Unfortunately, these other sources and control mechanisms are often ineffective in uncovering such problems, as is evidenced by the length of time dredging fraud went unnoticed. This lack of enforcement by the courts adversely

affects the deterrent capabilities of statutory law. If few prosecutions of graft are initiated, or if sentences are light, the credibility of statutory law as a deterrent is weakened. It would therefore seem imperative that the government make increased efforts to bring to trial those individuals who have undermined the justice of the procurement system by engaging in graft.

PART III

CONCLUSION

CHAPTER VIII

CONCLUSION

The subject of this thesis was an examination of political and administrative control over federal government contracting in Canada. The major argument was that political and administrative control over government contracting was inadequate to achieve certain principles relating to the conduct of governmental affairs. These principles were that:

- 1) the government should obtain fair value for the taxpayer's dollar;
 - 2) the government should be equitable in the dispensation of public funds; and
 - 3) the government should, when appropriate, relate its procurement activities to national policies and objectives.
- This study also undertook an examination of certain contractual problems impeding the exercise of control, as well as an examination of those factors which impaired or negated the effectiveness of the various sources of control. In addition, it endeavoured to state how control over government contracting might be improved.

The major problems that were identified as impediments to the exercise of control over government

contracting included:

- 1) cost control;
- 2) the maintenance of fairness and justice in the procurement process; and
- 3) the introduction of socio-economic goals which are incompatible with traditional procurement standards.

These problems were seen to hinder the attainment of the objectives of control and thereby to obstruct the exercise of effective control by the departments and agencies concerned.

Four types of cost control problems were identified and discussed in relation to the sources of control. These included needs definition, the use of the common service, as opposed to the private distribution system, cost recovery and financial mismanagement.

The problem of needs definition was originally defined as a common service-customer department relations problem involving the submission of specific as opposed to performance specifications. In this regard it was noted that common service departments exercise little, if any, control over single source requisitions. The only control mechanisms to address this problem are the estimates, Cabinet and the Treasury Board Secretariat. And they tend to examine it indirectly, in terms of a budgetary review of expenditures. Even in this regard, their effectiveness appears limited. Questionable expenditures are often placed in the final supplementary estimates and hurriedly passed through an ill-attended House near the end of a session. Cabinet is

congested with contractual business and its members subject to numerous time constraints. And the effectiveness of the Treasury Board Secretariat appears to be limited by the sheer size of government.

The second type of cost control problem involved the use of common service departments rather than the parallel private distribution system in meeting government procurement needs. This problem was considered in the section dealing with levels of authority. More specifically, it was examined in relation to those conditions under which the Department of Supply and Services encourages departments to contract directly.

The third problem, cost recovery, was a matter of concern to several control mechanisms including the Auditor General, statutory law and the courts. The Auditor General is perhaps the most effective of these controls inasmuch as he provides an organized and systematic consideration of the financial affairs of government. In this capacity, he gives the government an opportunity to recover misappropriated funds. Statutory law also deals with the problem of cost recovery. In this regard, it was noted that the Defence Production Act allowed the government to audit a defence contractor and reduce any costs or profits considered by the Minister to be too high. The control afforded by statutory law thus proved to be limited in that such provisions applied only to defence contracts. The ability of the courts to deal with this problem is also restricted

in that they have to depend on other control mechanisms to uncover such situations as well as initiate legal proceedings to recover expenditures.

Financial mismanagement was the fourth cost control problem considered. The control mechanisms involved with this problem are of two sorts, preventive and reactive.

The preventive control mechanisms include statutory law and administrative controls. Statutory law provides a valuable guide in matters of financial management. To this end, it institutes financial restraints that require all expenditures to be properly vouched and certified before payment. The administrative controls concerned with financial management include the expertise and review functions of common service departments, the determination of levels of authority with respect to cost approval, and cost control features within the contractual document. In the latter two instances, the ability of the control mechanisms to deal with this problem is limited by a lack of discretionary authority and by the existence of the lease purchase contract.

The reactive control mechanisms relevant to the problem of financial mismanagement are numerous. They include question period and debate, and Public Accounts Committee, the Auditor General, the Prime Minister, the Treasury Board Secretariat and the courts. Question period and debate tend to focus on sensational situations which could afford the opposition political benefit. This control tends to expound upon, rather than help uncover, instances of financial mismanagement.

The Public Accounts Committee and the Auditor General both concentrate on the problem of non-productive payments, wherein they question whether value for money is received. The effectiveness of the Public Accounts Committee is limited by a lack of expertise and by a lack of research staff. And the Auditor General's effectiveness is impaired by his failure to present to the bureaucracy an ever-looming and menacing presence.

The efforts of the Prime Minister with respect to the problem of financial mismanagement centre upon his ability to mediate departmental disputes in the procurement area. The Treasury Board Secretariat is another executive control mechanism that is concerned with such problems. However, its effectiveness is limited by the fact that it rarely becomes aware of contractual matters that fall below a department's contract approval ceiling. The courts also deal with problems of financial mismanagement. They give the government an opportunity to claim damages and thereby to recoup losses incurred as a result of a contractor's mismanagement in the fulfillment of a contract. In this regard, it was noted that the process works both ways. A contractor can also sue the government for damages on the same grounds.

The problem of cost control is dealt with by various control mechanisms of varying abilities. Some problems are given little attention, others a great deal. Among those which are given insufficient or no attention

are the problems of needs definition and the use of the common service, as opposed to the private distribution system. The problem of cost recovery is handled by a number of control mechanisms, but they are subject to various limitations. Only the Auditor General is an effective control with regard to cost recovery, and even his efforts are restricted by the sheer size of government.

This study gave extensive consideration to the problem of financial mismanagement. Both preventive and reactive control mechanisms were considered in the context of this problem. Their ability to deal with such situations is effective in many instances, but nevertheless limited, as evidenced by the number of cases of financial mismanagement that occur and the length of time they go undetected. In summary, the ability of the various sources of control to deal effectively with cost control problems and thereby contribute toward the attainment of the objective of best value was seen to be limited.

The second major problem considered was that of maintaining fairness and justice in the procurement process. This involves not only preventing graft, but maintaining equitable administrative practices and procedures.

The problem of graft was dealt with by several control mechanisms including question period and debate, the Public Accounts Committee, the Treasury Board Secretariat, statutory law and the courts. Question period and debate often focus on this problem, inasmuch as they provide the opposition with

opportunities to embarrass the government. This control mechanism is effective as an opportunity to expand upon occurrences of graft, but is not so effective at uncovering them. The Public Accounts Committee also deals with the problem of graft. However, its activities in this area are extremely limited. Indeed, the only notable investigation carried out by the Committee in regard to graft was the inquiry into the nuclear reactor affair.

The Treasury Board Secretariat is a relatively effective control mechanism in dealing with the problem of graft. It has developed conflict of interest guidelines directed at preventing the occurrence of such activity and has undertaken studies of specific situations, such as dredging fraud, in order that it might prevent future abuses in the procurement process. However, the effectiveness of the Treasury Board Secretariat is limited by virtue of the fact that it is unable to oversee a great deal of the contractual activity undertaken by government.

Another control mechanism that deals with the problem of graft is statutory law. Its effectiveness stems from its ability to act as a deterrent. And if its deterrent capability is not sufficient, the courts provide the means by which to administer punishment. However, the effectiveness of these controls is impaired by a lack of enforcement. Without adequate enforcement the courts are unable to fulfill their punitive function and statutory law is deprived of some of its credibility.

The objective of promoting equity in the procurement process was also examined in terms of the problem of maintaining equitable administrative practices and procedures. The control mechanisms which addressed this problem include individual ministers, the Treasury Board Secretariat, common service departments and the courts.

In Chapter 6, the contribution of individual ministers to the objective of equity was examined. The specific case involved the Minister of Supply and Services and his decision not to grant special status to a large electronics manufacturer, thereby upholding the objective of equity. Such cases are rare, however, in that ministers seldom become directly involved with maintaining equitable administrative practices and procedures.

The Treasury Board Interdepartmental Committee on Contracts was also seen to exercise significant control with respect to this problem. It did so by examining contractual policies and procedures and making recommendations thereon. Common service departments were also viewed as an effective control mechanism in this respect. They exercise control by means of policy review groups and centralized expertise. However, frequent staff turnovers, particularly in the Department of Public Works, impair their ability to deal with this problem.

The courts were another means of control with respect to equity. They exercise control through contract interpretation and through a consideration of appeals

against subordinate legislation. In this capacity, they are able to remedy a specific problem, as well as indicate to the government that it exists. The effectiveness of this control mechanism is dependent, however, on such cases being brought to trial.

These various control mechanisms have proved to be fairly effective in dealing with the problem of maintaining fairness and justice in the procurement system.

The third and final problem examined was that of the introduction of socio-economic goals which were incompatible with the procurement function of government. Such socio-economic goals were seen to be inconsistent with the objectives of equity and best value. The most important control mechanism with regard to this problem is Cabinet, inasmuch as it is the primary source of the problem. This is the case insofar as Cabinet is responsible for issuing socio-economic directives which are often incompatible with the objectives of equity and best value. In this regard, it was suggested that Cabinet not needlessly undermine the objectives of control, when other means to promote socio-economic goals are available and feasible. The other control mechanisms addressing this problem were the estimates and the Treasury Board Secretariat. They did so in terms of relating socio-economic goals and government priorities to procurement needs. In this context, they advanced socio-economic goals which were consistent with the procurement function of government.

Improving control over government contracting is no easy matter. In the preceding chapters, some suggestions for improvements have been made. However, there exist many more problems and many more approaches with which to solve them. The procurement process will probably never reach anything near perfection. But when one considers how many problems exist and how much more room there is for improvement, the exercise of control over government contracting does not seem adequate. The major objectives of control, equity, best value and the introduction of socio-economic goals consistent with the procurement function have all too often been frustrated and undermined. There just seem to be too many problems, too few solutions and too few effective sources of control to maintain that the exercise of political and administrative control over government contracting is adequate.

This conclusion is particularly important in the light of the Auditor General's recent statement that the government has almost lost control over the public purse. After all, expenditures for government contracting are an important part of total government expenditure. It would be useful therefore, if the Royal Commission which has been established to examine government control of expenditure would explore the extent to which more effective control over government contracting could be achieved.

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Interviews were also held with eight other civil servants, who have requested that they be listed as confidential sources. These individuals were extremely helpful in furnishing me with information and material on the contracting activities of the Department of Supply and Services. The interviews were held during July and August, 1976. However, additional contacts have been made since that time.